109-48 v

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 104.

STEPHEN PERCY ELLIS, INEZ RUTH ELLIS, AND HER HUSBAND, EDWARD PECKHAM, AND A. MORTIMER, DALGHREN, APPELLANTS,

vs.

JEFFERSON DAVIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 11, 1880.

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a UNITED STATES OF AMERICA:

Circuit court of the United States in and for the fifth circuit and district of Louisiana.

STEPHEN PERCY ELLIS AND OTHERS
versus
JEFFERSON DAVIS. } No. 8934.

William Reed Mills, esq., for complainants, appellants; Messrs. Breaux, Fenner & Hall, E. H. Farrar, and C. L. Walker, for defendant, appellee.

TRANSCRIPT OF RECORD.

Appeal. Returnable to the Supreme Court of the United States of America, at Washington, D. C., on the second Monday of October, 1880.

1 *Bill of complaint.—Filed December* 12, 1879.

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana, sitting in equity:

Stephen Percy Ellis, a citizen of the State of New York, residing in Brooklyn, in said State, Edward Peckham, and Inez Ruth Ellis, his wife, said Edward by birth, and said Inez Ruth by marriage, subjects of Victoria, Queen of Great Britain and Ireland, residing in the parish of Tensas, in this State; A. Mortimer Dahlgren, a citizen of the State of Missouri, residing in St. Louis, in said State, bring this their bill of complaint against Jefferson Davis, a citizen of the State of Mississippi, residing in the county of Harrison, in said State, and thereupon your orators complain and show:

That Sarah Ann Ellis, widow of Samuel W. Dorsey, late of Harrison County, State of Mississippi, was, during her life and at the time
2 of her death, seized in fee-simple or otherwise entitled to, and lawfully possessed of, certain lands, rights, credits, and other property situate in the States of Louisiana, Mississippi, and Arkansas, and, among others, the two certain plantations situate in the parish of Tensas, Louisiana, and known as the Elk Ridge plantation, bounded, so far as known to your orators, and so by them understood, north by the public road and Halsee plantation and Hewitt plantation; east by Limerick plantation, belonging to the Thompson heirs, lands of Sevin & Floyd; south by lands of Sevin and the estate of William Adams; west by the Hewitt plantation and Canton plantation, being parts of sections 10, 11, 55, 56, 58, 59, & 61, the whole of section 60, township 13, range 13 east, comprising two thousand nine hundred and forty-nine acres; and a portion of what was known as the Limerick plantation, and now included in said Elk Ridge plantation and what is known as the Styx lands, being parts of sections 22 & 23, township 13, range 12 east, containing four
3 hundred and sixty-nine acres; also the Elliston plantation, bounded north by Glade bayou, east by school section 16, township 13, range 11 east, known as the W. A. Beck plantation, and wild lands of *of* W. M. W. Cochrane; south by Marydale plantation; west by the Oaks

plantation; Elliston being parts of sections 17, 18, 19, 20, township 13, range 11 east, one thousand and seventy-six acres. Also the property known as "Beauvoir," situate in Harrison County, Mississippi, containing about six hundred and eighty acres. Also a lot at West Biloxi, in said county of Harrison, designated as lot No. 14, measuring one and half arpents front by eight arpents deep, as more fully described in the act of sale, hereto annexed as Exhibit C. Also a large amount of movable and personal property, rights, and credits, the full description whereof as well as the description of the said lands situate in the State of Arkansas, are, at this time, unknown to orators.

That said Sarah Ann Dorsey deceased on the fourth day of July, 1879, intestate, leaving, in absence of heirs in ascending and descending
4 lines, your orator, her brother, Stephen Percy Ellis, your oratrix, her sister, Inez Ruth Ellis, and Mary Ruth Ellis, her *neice*, only child surviving of Thomas L. Ellis, brotheir of said Sarah Ann, pre-deceased, all heirs of full blood, and her uterine brothers, your orator, A. Mortimer Dahlgren and J. Adolphe Dahlgren, her next of kin, and sole legal heirs in the collateral line, and in whom, on the death of their said sister and aunt, the whole of her estate, movable and immovable, real and personal, became legally vested, in respective shares of one undivided fourth part each to Stephen Percy, Inez Ruth, and Mary Ruth, heirs of full blood, and one undivided eight' each to said A. Mortimer & J. Adolphe, heirs of half blood.

That during her lifetime, to wit, on the 10th of May, 1878, the said Sarah Ann Dorsey, with the advice and consent of the said defendant, by notarial act of procuration before O. H. Violet, notary in and for the parish of Orleans, constituted said defendant her agent and attorney in fact, with full and special powers to take exclusive control, charge,
5 and management of all and singular her property and estate, and all transactions and business in any manner therewith connected, including the power "for and in her name to sue and be sued, to purchase, lease, alienate, or encumber real estate situate anywhere, to borrow money, execute notes, or other evidences of indebtedness," as will more fully appear by authentic copy of said act of procuration hereto annexed as part of this bill, as Exhibit A.

That, in virtue of said agency, the defendant entered upon and assumed the exclusive management of said property and business, and took possession of all account books, title deeds, and papers thereto appertaining, and continued in the exclusive control, management, and possession as said agent to the time said agency expired by the death of the principal, and since her said death has still continued in said exclusive possession, management, and control.

That though on the expiration of said agency it was incumbent on and duty of said defendant to render to said heirs, all of whom, and
6 their respective rights, were well known to him, a full, fair, and correct account of his administration of said agency, and to surrender to them, all and singular, the said property, account books, title deeds, papers, &c., which had then come into his possession, and which your orators had well hoped he would have done, yet, on the expiration of his said agency said defendant, notwithstanding amicable demand, refuses still so to do.

But now, so it may please your honors, the said defendant, being in no manner ignorant of the premises, in order to wrong and injure your orators and their coheirs, and in order to prevent your orators and their coheirs from obtaining possession of the said property thus illegally withheld by him, as also from obtaining an account of his acts as agent, &c., pretends and gives out that the said Sarah Ann Dorsey, by a certain instrument in writing, hereinafter to be fully recited, executed her certain
7 last will and testament, by which she bequeathed to him all her property, real, personal, and mixed, wherever located and situated, wholly and entirely, without hinderance or qualification, for his own sole use and benefit, and constituted him her sole heir, executor, and administrator, and which said instrument the said defendant claims the full benefit of as being the last will and testament of said Sarah Ann Dorsey, and threatens and intends in case your orators and their said coheirs, or either of them, should proceed at law or in equity against him touching the matters aforesaid, to set up said pretended bequest and universal legacy, and a certain decree of probate proceedings thereunder, hereinafter in this bill to be with greater certainty set forth, as a bar thereto, as a muniment of title to all and singular the estate of said Sarah Ann Dorsey.

Now, your orators charge the contrary of all these pretences to be true. That, though true it doubtless is, the said Sarah Ann Dorsey did write and sign a certain instrument containing such clauses as by defendant
8 pretended, being that filed at his instance in the second district court for the parish of Orleans, on the 15th of July, 1879, and being in the words and figures following, to wit:

"BEAUVOIR, HARRISON CO., MISS., *Jan.* 4, 1878.

"I, Sarah Ann Dorsey, of Tensas Parish, La., being aware of the uncertainty of life, and being now in sound health in mind and body, do make this my last will and testament, which I write, sign, and seal with my own hand in the presence of three competent witnesses, as I possess property in the States of Louisiana, Mississippi, and Arkansas. I owe no obligation of any sort whatever to any relation of my own; I have done all I could for them during my life; I therefore give and bequeath all my property, real, personal, and mixed, wherever located and situated, wholly and entirely, without hindrance or qualification, to my most honored and esteemed friend Jefferson Davis, ex-president of the Confederate States, for his own sole use and benefit in fee-simple, forever; and I hereby constitute
9 him my sole heir, executor, and *and* administrator. If Jefferson Davis should not survive me, I give all that I have bequeathed to him to his youngest daughter, Varina.

"I do not intend to share the ingratitude of my country towards the man who is, in my eyes, the highest and noblest in existence.

"In testimony whereof I sign this will, written with my own hand, in the presence of W. T. Watthall, F. S. Hewes, and John C. Craig, subscribing witnesses, resident in Harrison County, Mississippi.

(Signed) "SARAH ANN DORSEY.

"At Mississippi City, on the fourth day of January, eighteen hundred and seventy-eight, the above-named Sarah Ann Dorsey signed and sealed this instrument, and published and declared the same as and for her last

will, and we, in her presence and at her request, and in the presence of each other, have hereunto subscribed our names as witnesses.

"W. T. WATTHALL,
"F. S. HEWES,
"JOHN C. CRAIG."

Yet your orators specially deny that said foregoing instrument
10 was the will of said Sarah Ann Dorsey, or that the behest therein is valid or of right can be set up by defendant as a muniment of title and bar to the claim and demand of your orators as legal heirs of said Sarah Ann Dorsey. But on the contrary your orators specially charge that the said alleged will in it entirety, and particularly as regards the bequest contained therein to said defendant, is null and void.

That previous to and at the time of writing and signing the same said Sarah Ann Dorsey was not of sound and disposing mind.

That the same was written and signed by her when under the undue influence of said defendant, and which said undue influence excited and aggravated the causes depriving her of a sound and disposing mind, rendering her more susceptible to such undue influence.

That the motive and object inducing and controlling said testatrix to make said bequest to said defendant, as well as the said bequest itself, were, under the law of the land, illegal, null, and void.

11 Under the circumstances aforesaid your orators insist that said pretended will, and especially the bequest therein to defendant, are and should be held null and void on account of her being, at the time of writing and signing the same, not of sound and disposing mind, and under said undue influence, and the illegal/ity of said bequests.

8th. But nevertheless the said defendant insists upon the contrary and claims the full benefit of said pretended will, sometimes pretending "that the will is incontestably, absolutely perfect as a legal document, and as to her capacity and soundness of mind of said testatrix, at the date of its making, before, and since, there has never been any question."

Whereas your orators charge the contrary to be true, and that during many years previous to the death of said testatrix there existed in the minds of friends and acquaintances doubts as to her mind's soundness or capacity for rational action, either as judged by her conversation, writings, or actions, especially regarding subjects, persons, and matters in and concerning which she became deeply interested or strongly attached.

12 Though true it is, as at times averred by defendant, "Mrs. Dorsey possesses a high order of intelligence and ability and such as rendered her capable of bringing around her in close association a large circle of friends, comprising the accomplished of her sex and many eminent litterateurs, and the ablest and most prominent of men in political and social life," yet equally true was it that such was her mental temperament, nervous, impulsive, and enthusiastic, that towards those whom her mind conceived as pre-eminently distinguished in intellect, patriotism, or virtue she formed an attachment of esteem and veneration which so absolutely influenced and controled her as to bias her judgment and, for the time, impair the other faculties; and, as regards her thoughts, language, and acts, they were not only strange and erratic, but unnatural, unreasonable, and unsound, and regarding which she became impatient of

and would brook neither control nor advice from either relatives or intimate friends. In religion her mind exhibited a similar changeabe, erratic, and intensely enthusiastic character. A Roman Catholic by baptism,
13 under educational influences she espoused the Presbyterian faith and became a communicant in that church. Subsequently she embraced the doctrines of and became a devout worshipper in the Protestant Episcopal Church. Afterwards, through the teachings of a distinguished Hindoo of high caste, to who' she was devotedly attached, she became a believer and public advocate of what she termed the Aryan philosophy, and, in the mean time, to such extent did her mind wander and change, that in later years it indicated atheistic tendencies; returning, in her last days, as orators are informed, to Christianity.

On political matters her mind passed through extreme changes. During the civil war her sympathies were enthusiastically enlisted on the Southern side, and so continued till the year 1876, when, after a sojourn of several months in one of the Northern States, she as sincerely entertained directly opposite sentiments, declaring "that the causes of the war were chimerical, and that the people of the Southern States had been deceived into entering a fated cause to gratify the ambition and
14 hatred of a few crazy politicians," holding the cause and some of its chief leaders in contempt. Subsequently and soon after defendant came to reside at Beauvoir—the name given by her to her residence—her mind in this regard underwent a change to an enthusiastic love for the Confederate cause and reverence for the defendant as its ex-President, caused, as she stated, by his representations, alike in conversation with her and in the history which at the time he was engaged in writing.

In business matters there were also frequent indications of unsoundness of mind, and which had *been* previous to the death of Mr. Dorsey, caused uneasiness on his part as to the effect of the same on the management of her property after his death. And, as illustration and in proof of the reasonableness of such anxiety, reference is made to the character of her alleged will, to her transactions with defendant, and especially to the said power of attorney of May 10th, 1878, whereby, without any sound business reasons, she gave to him an unlimited power to dispose of her property, either by sale or mortgage, without limit as to price, terms, or duration,
15 and even so far was it the evident intention that this power should extend, that, in not describing in the act of procuration the property authorized to be sold or mortgaged, it was really nugatory; as also to the transfer of her title to her residence, Beauvoir, and other property, situate in Harrison County, Mississippi, on February 19th, 1879, to defendant without any security whatever for the payment of any portion of the price, and this while he held a power of attorney, rendering him incompetent to be a purchaser of her property. These peculiarities of the testatrix, characterizing an unsound mind, became the more apparent and developed during defendant's residence at Beauvoir from December, 1876, to her death, and unquestionably were mainly caused by defendant.

During this period her mind was absorbed in an extreme belief in the righteousness of the Confederate cause; that its principles should still be contended for and never yielded; that the so-called Confederate
16 Government, de jure at least, still existed, and that her country was confined to the States comprising it, and her mind labored under

an illusion as to defendant's unequalled sufferings and sacrifices, both moral and pecuniarily, and his martyrdom in its defence, as well as regards his imagined superhuman virtue, patriotism, and goodness, and all those excellencies of character which would render a man the highest and noblest in existence, and that instead of appreciation justly due to him, her country, the Confederacy, had heaped upon him only ingratitude; and to such a degree had her mind in this regard become disordered, that from some time previous to and at the time of the execution of her said alleged will, and up to the time of her death, her reason, as to her thoughts, sentiments, feelings, and actions, in every regard wherein said defendant, his sentiments, feelings, and wishes were in any the least manner involved,
17 was practically dethroned and but the reflex of what it conceived to be his wishes and desires, and insensible to ordinary and natural feelings, rendering it morally & mentally impossible for her mind to exercise an unbiased judgment or perform a reasonable act wherein said defendant, his wishes, and interests, pecuniary or otherwise, were in her imagination involved.

Another cause injuriously during this time affecting her, both mentally and physically, was a disease erroneously believed by her to be necessarily fatal, and this notwithstanding the positive assurance to the contrary of her physician, in whose judgment she had always entertained the utmost confidence, and owing to the continued erroneous belief in its existence, and against his admonitions, she persisted in having performed a surgical operation, which orators are informed hastened her death.

All which the foregoing, as well as many other facts to be exhibited on the hearing of this cause, and which were well known to her rela-
18 tions and friends, are here set forth as refutation of defendants said pretense, "that not only was said testatrix of sound and disposing mind, at the time, before and after the execution of said will, but that the fact thereof had been never questioned."

And at other times defendant allows it to be given out, on his behalf and through the public press, "that all statements and suggestions that he exercised a particle of influence over Mrs. Dorsey, to induce her to make him her legatee, are born of greed and hate, the filthy progeny of the auri sacra fames, are unqualifiedly false, malicious, and contemptible," meriting "that her lustrous eyes should wake from the lethargy of the grave and pierce with their scornful glances the foul ghouls, who under the guise of relationship, should so pretend, or seek a judicial investigation of said charge against said defendant." Whereas your orators charge the contrary of all said defendant's pretenses and denial to be true; and that said de-
19 fendant, from a short time after he became a guest at Beauvoir, until Mrs. Dorsey's death, exercised an undue influence over her in all matters connected with her business, her property, including her relations with her family and especially as concerns the making of said alleged will, as well as inducing her to execute the—under the then existing circumstances—exceptional powers of attorney, and the subsequent transfer to him of the title to her homestead. That perceiving her generous impulses to the weak and unfortunate, and her unsoundness of mind in the management of her property, and when excited to admiration and unbounded esteem for those whom she considered pre-eminently great, and to an enthusiasm for a cause in behalf of which she became enlisted, de-

fendant, through his acts, conversation, and writings, took advantage of this, her weakness, to impress her mind with exaggerated thoughts and feelings regarding the late civil war, and himself as its leader, em-
20 bodiment, and martyr; and himself having a strong, grasping, arbitrary, and, at times, a domineering will, and in this respect strengthened rather than softened by his defeat, which created a marked feeling or illusion that he really had suffered ingratitude from a people for whose liberties he had risked all, and in a written defense and continued advocacy of which he was passing the remainder of his days, he found it easy to impress and force upon her imagination, as a patriotic duty, and as a reward for his said services, while living, to expend, on behalf of himself and friends, beyond her revenue, her estate, entrust him with an unlimited power over its management and disposal; though embarrassed, yet without money, but for his simple notes of hand to surrender to him the title to her homestead with most of its contents, that he might enjoy a fuller legal dominion over it, and to secure to him by will the exclusive ownership of her property at her death; and which power and exercise of undue influence were apparent to all who were members or frequent visitors
21 of her family, and which influence said testatrix did not appear able to free herself from, or her relations to induce the defendant to cease from.

All which, the foregoing, as well as many other facts to be exhibited on the hearing of this cause, are set forth in refutation of defendant's pretense that said alleged will and bequest therein to him were not written through any undue influence exercised by him over the said testatrix.

At other times, defendant allows it to be given out on his behalf, and through the public press, as a rational cause for the bequest of her whole estate to him, a stranger, to the exclusion of her sister, brothers, and neice, that at the time of executing said will said relations were estranged from the testatrix; that they had for years resided in distant communities, themselves in easy circumstances, and certain of them to a large extent had been the beneficiaries of her generosity; that none of them had of late years, nor in fact at any time, any good reason or right to expect
22 to obtain her property; that the deceased had her reasons, and to those who are informed and disinterested those reasons are amply sufficient for acknowledging no obligation on her part to them; and had she not made this disposition of it she would have bequeathed it elsewhere than to her next of kin; that she had known and loved Mr. Davis from her girlhood with the affection of a daughter; that the friendship existing between Mrs. Dorsey and the family of Mr. Davis, and her affection for the younger daughter were sufficient to prompt the donation, which would not have excited comment from those who were cognizant of the associations.

Whereas your orators expressly charge the contrary of all these pretenses to be true; and that the relations of the testatrix to her sister, brothers, and niece were until defendant's arrival at Beauvoir and took up his residence there, of the most affectionate character and continued with all of them, with the exception hereafter stated, to the time of her death, as will be made to appear by, besides other evidence, her correspondence with them.

23 That your oratrix, Inez Ruth Peckham, had for years resided

in the same neighborhood as her sister, and on a sister's intimacy, and which continued, notwithstanding that subsequent to defendants arrival at Beauvoir there arose in regard to his actions and doings, frequent and at times unpleasant discussions, yet no open rupture occurred till some time in the month of February, 1879, when urged by a letter from her brother, J. Adolphe Dahlgren, of Nashville, Tenn., to induce her sister to request the defendant to leave, and pointing out the wrong caused by his remaining; your oratrix appealed to both her sister and defendant to comply with her brother's request, and handed at the time her brother's letter to the defendant; whereupon, and after reading it, he, in harsh and severe language, refused to accede to the request.

After this interview the sisters never met, though subsequent to her sister's death oratrix received, through a relative attending her in her last illness, the message from her, that "she (your oratrix) had done me
24 no harm. I do not blame her for anything she has said or done to me, but I can never forgive her for her attack on Mr. Davis."

That your orator, A. Mortimer Dahlgren, is the youngest—now aged twenty-three years—of Mrs. Dorsey's brothers, and to whom she was very much attached. While he was residing in New York, she desired him to leave that city and remove to Beauvoir, to live with her and manage her affairs, and as an inducement promised that if he would do so, he should never want for anything again; that she would give him a profession; would treat him as her own child, and should he ever want to go into business, she would furnish him the means of so doing.

Relying implicitly on these affectionate assurances your orator left New York and arrived at Beauvoir on March 5th, 1877. Immediately on his arrival his sister called the servants together, and in his presence told them he was now the head of her household; that he had come to take charge of all her affairs, and that his orders were to be obeyed by every one.

25 Under these conditions orator took entire charge of his sister's business, and in full accord and to her satisfaction, which continued for some time, when he discovered that defendant's advice was taken, and to a great extent followed by her, until he became, in orator's place, her agent with full powers. Though as in case of your oratrix, Mrs. Peckham, there were discussions between him and his sister, and on his part similar remonstrances, yet orator remained a member of his sister's family till February, 1879, when, being informed by her that she had the day before put Beauvoir in Mr. Davis' name, though this was done with the understanding that it was only to be during his, defendant's lifetime, and that she could have it back whenever she liked. Orator told her he could not remain on Mr. Davis' place, and thereupon, parted from his sister, though in an affectionate manner; she then saying to him, "If you are determined to go all I can do for you at present is to give you your choice of lands either in Louisiana or Arkansas; which would you rather
26 have?" Orator replied "The Arkansas land." She replied, "Very well, the Arkansas land is yours; I shall have the deed made out immediately, and give it to you. This is all I can do for you at present, but I intend to do a great deal more."

During her illness and subsequent to the surgical operation, orator visited his sister at the St. Charles Hotel, in New Orleans, and she appeared

very happy to see him. Again referring to the Arkansas lands and saying that though it had not been attended to, yet as soon as her strength returned she would write to her agent and have the papers prepared, and the land given to him, which orator is yet unaware of having been done.

Your orator, Stephen Percy Ellis and his family, though residing at a distance from his sister, remained, through correspondence and interchange of visits in close and affectionate intimacy with her. In 1865 his daughter Lilian, accompained her aunt to her home in this
27 state, and remained with her; first at Buckridge, Louisiana, and afterwards accompanied her to Beauvoir, where she remained till the summer of 1876, and such was the aunt's attachment for her that she adopted her as her daughter, announcing this to orator's wife by letter, in the following language: "From this moment you will consider her (Lilian) as my adopted daughter; I will help her all I can in her journey through life, and we will have to divide her between us until she chooses seme one else to take care of her. * * * You have not withheld your child from me, and you will never regret it." And she continued to frequently write to members of his family as late as June 7, 1879, and always in affectunate terms.

There also existed a warm reciprocal attachment between T. Adolphe Dahlgren and his sister Mrs. Dorsey.

Mrs. Dorsey was also strongly attached to Mrs. Ellis, widow of Thomas S. Ellis, and her daughter Mary Ruth Ellis, who was a member of
28 her aunt's family during the winter of 1876,–'7. This feeling was strengthened by the fact that during the last illness of her brother, caused by exposure in the civil war, both Mr. and Mrs. Dorsey, at whose residence he died, promised him that his daughter should be cared for and supported by them. Such were the injunctions of Mr. Dorsey to his wife just previous to his own death, which occurred in October, 1875, and which she subsequently, often expressed her intention to carry out by by recognizing her as one of her heirs.

Equally erronerous are the pretences that your orators and their coheirs were the beneficiaries of their sister and aunt during her life-time. Acts of kindness, such as inviting her nieces and her brother, your orator, A. Mortimore, to reside with her, and reciprocal attentions used in families, constituted the only beneficies received by any of them at her hands.

Alike erroneous is the pretense that any of her said relations
29 were at the date of said will in easy circumstances. The contrary is the truth, except as to your oratrix, Mrs. Peckham, and orator A. Mortimer Dahlgren, and as to him this depended upon the carrying out of his sister's promise to him.

Equally imaginary are the pretences that "Mrs. Dorsey had known, honored, and loved Mr. Davis from her girlhood with the affection of a daughter," as the truth is that previous to his becoming a member of the Beauvoir family they had formed scarcely any personal acquaintence; as also her alleged friendship for his family and affection for his youngest daughter, for; as to the latter, Mrs. Dorsey only knew her subsequent to the alleged will, and the contrary is the truth as to the other members.

And now your orators further show:

That the defendant, though in no wise ignorant of the premises herein before set forth touching the nullity of said alleged will and its bequest in

his favor, yet, in the hope of rendering said instrument more effective
30 a muniment of title and bar to the enforcement against him of their said rights and demands, did, ex parte and without any previous notification, judicial or extrajudicial, resort to certain proceedings before the second district court for the parish of Orleans, as will appear in extenso by the certified record thereof, entitled "In the matter of the succession of Sarah Ann Dorsey, No. 41376 of the docket of said second district court, hereto annexed as part of this bill, as Exhibit B.

That by said proceedings it appears that on the 15th July, 1879, defendant, through his attorneys, filed his certain petition, in which he alleges that by the tenor of the last will and testament of Mrs. Sarah Ann Dorsey, dated 4th January, 1878, he is made the legatee and executor of the deceased; that said will had been on said day filed, and which he prays might be duly proved according to law; that thereupon an order was obtained that said will should be proved before the judge of said
31 court forthwith; that in accordance with said order, and on proof that said instrument was wholly written, dated, and signed in the handwriting of the testatrix (the only proof essential under the laws of Louisiana and the practice of its courts for an ex parte probate of an olographic will), and on the further (and unusual in such ex parte probate) sworn statement of two of the subscribing witnesses that "the testatrix, Mrs. Sarah Ann Dorsey, at the time of the execution of the aforesaid will was of sound and disposing mind," a decree of probate, in usual form, was rendered, decreeing the probate and registry of the will and execution of its provisions, including the issuing of letters of executorship on defendant's complying with the provisions of law.

That by said proceedings it further appears that without previously qualifying as executor or applying for an order of inventory, or in any manner showing to the court the amount of the indebtedness of the succession; without tendering any security to creditors or deferring
32 his application for a reasonable time, within which creditors might, should they desire, demand of him security, or heirs might contest the validity of the will, or any of its provisions, or the sufficiency of the testimony for its probate—proceedings not only usual, but, as to most of them, essential prerequisites to any demand by a testamentary heir or universal legatee to be put in possession of an estate; yet, notwithstanding this, said defendant, on the said 15th July, by representing to the court that the testatrix left no forced heirs and owed no considerable debts, that he was willing to accept and take the successions pure and simple, and that in his opinion "there is no necessity of further administration," obtained an order, "That, as the sole and universal legatee of the late Sarah Ann Dorsey, petitioner, Jefferson Davis, be put in possession of all the property, real, personal, and mixed, left by her and wherever situated."

That by said proceedings and decrees said second district court
33 ceased to have jurisdiction over or regarding the administration of said succession, and, owing to his citizenship and the limited jurisdiction of said court, defendant in the premises ceased to be in any manner further amenable or subject to its jurisdiction.

That although said proceedings and decrees, as your orators are advised, are not res adjud'ta against them, yet, nevertheless, in virtue thereof, said will and its order of probate are and will remain a muniment of title in de-

fendant to all and singular the estate of said Sarah Ann Dorsey so long as said will and order of probate shall remain unannulled and unrevoked through judicial procéedings had contradictorily with said defendant.

Now your orators, reiterating that said will in its entirety, and particularly as regards the bequest contained therein to said defendant, is
34 null and void and of no effect in law for the reasons heretofore in this bill set forth, and should be cancelled and annulled, further say that said decree of probate was unadvisably rendered, and should be revoked, cancelled, and recalled for the reasons rendering said will, of which it is the probate, null and void, and because the testimony given in support of said probate, "that at the time of the execution of the aforesaid will the testatrix, Sarah Ann Dorsey, was of sound and disposing mind," is false or erroneous; that the said testimony, even if uncontradicted, would be insufficient legal proof that said testatrix was of sound and disposing mind, because in said testimony the means, source, and extent of the said witness' knowledge are not shown; whether at the time of witnessing the instrument they had means of forming, or sought to form, a correct
35 opinion in regard thereto; whether the will was written in their presence, read by or to them; whether they were friends or intimate acquaintances of the testatrix—all inquiries recognized as essential ingredients of reliable proof, and regarding which the will itself furnishes grounds for reasonable doubt, as it shows that while the testatrix dated and wrote the will at Beauvoir, she signed it at, and it was witnessed by persons residing in, Mississippi City, six miles distant.

And your orators further say that for the like and foregoing reasons the said decre putting defendant in possession was unadvisedly rendered, should be revoked, cancelled, and recalled.

And now your orators show that in order to still further wrong and injure them and their coheirs, and to further prevent them from the enforcement of their said rights as owners of that portion of said prop-
36 erty situate in Harrison County, Mississippi, and known as the "Beauvoir" estate, defendant claims the full benefit of said pretended sale of February 19th, 1879, of which Exhibit C is a copy, as a valid contract of sale to him of said property, and threatens and intends to set up and plead said instrument as a further bar to the said rights and demands of orators and their coheirs to said property.

Yet your orators specially deny that said instrument was or is a valid sale of said property to defendant, or of right can be set up as a muniment of title and bar to the claim of your orators and their coheirs to the ownership thereof. But, on the contrary, your orators specially charge that said instrument of February 19th, 1879, is null and void, and of no effect in law, for the reasons not only as herein before charged as regards the nullity of the alleged will of January 4th, 1878—that is, that before and at the time of executing said instrument the said Sarah Ann Dorsey was not of sound and disposing mind; that the
37 same was executed by her when under the undue influence of the defendant, and which said undue influence excited and aggravated the causes depriving her of a sound and disposing mind, rendering her more susceptible to such undue influences; that the motive and object inducing and controlling said vendor to make said conveyance to defendant, as well as said conveyance itself, were under the laws of the land illegal, null, and void—but also for additional reasons, that under his

said agency of May 10th, 1878, defendant had no legal right to purchase property then within his absolute disposal, and that his consent to the sale of said property, under these circumstances, to himself, and without any security for the payment of its price, and which was below its value, was a flagrant violation of the trust thus assumed by him as agent, and of which pretended sale he cannot morally or legally claim any ben-
38 efit from; and for which reasons the said pretended act of sale of February 19, 1879, should be cancelled and annulled.

And your orators say that from the said acts and doings of defendant, from the time he became a guest at Beauvoir, in December, 1876, to the time of Mrs. Dorsey's death, and his said subsequent acts, including as well his acts superinducing the writing of said alleged will of January 4, 1878; the act of procuration of March 10, 1878; the conveyance of February 19, 1879; the proceedings in the matter of probate, including the order of possession of July 15, 1879, as also the various erroneous statements which he has either caused or allowed, uncontradicted by him, to be published in explanation and defence of his retention of her estate, have forced orators to the conviction, and so they now charge, that his said acts and doings during Mrs. Dorsey's life-time were parts of a preconceived scheme of the defendant, by exerting in the manner and form afore-
39 said an undue influence over her, to get her estate wholly within his power, and which scheme, after her death, he has sought to consum'ate by retaining possession thereof under the alleged will, its probate, and the order of court putting him in possession.

Under the circumstances aforesaid your orators advised and insist that said pretended will of Sarah Ann Dorsey, dated January 4, 1878, and said two decrees of July 15th, 1879, and the pretended sale of February 19th, 1879, are and should be held of no effect as against your orators, as her next of kin and legal heirs, and that defendant has no muniment of title thereunder in and to her said estate, or any portion thereof, by said will and act of sale assumed to be bequeathed and conveyed to him, or as a bar against the rights and demands of orators and their coheirs against said defendant for the possession of all the property to her said estate
40 belonging, and the rendition by him of a full and fair account of all and singular his acts and doings in regard to said property as, during her life-time, her agent, and since then trustee.

Your orators further show that the largest and most valuable portion of said property is real estate, situate in Louisiana and within the jurisdiction of this court, and with the control and management of which defendant's said agency was mainly connected.

That owing to the complicated character of the said agency thus held by defendant an account thereof, as herein demanded, cannot be properly taken except in a court of equity.

And your orators had well wished that defendant would have ceased and refrained from further resistance to the just rights of your orators and their coheirs, and would have complied with such their reasonable request as in justice and equity he ought to have done, and have
41 admitted the claim of your orators and their coheirs as sole legal heirs to the ownership of the estate of said Sarah Ann Dorsey, and have surrendered to them the peaceable possession thereof, including all books, papers, and title-deeds to the extent the same were and are in

his possession, and have rendered a full and fair account of his said agency; but now, so it is, the defendant insists upon the contrary and persists in claiming the benefit of her alleged will of January 4th, 1878, and the said decree of probate, and the decree putting him in possession of her estate of July 15th, 1879, and the alleged act of sale of February 19, 1879, and threatens and intends, in case your orators or their coheirs, or either of them, proceed against him touching the matters aforesaid, to set up said pretended will, said decrees, and said pretended act of sale in bar thereto.

42 All which actings, doings, and pretenses of defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orators and their coheirs in the premises.

In consideration whereof, and as much as your orators are remediless in the premises at and by the strict rules of the common law, and are relievable only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end, therefore, that the said defendant may, if he can, show cause why your orators should not have the relief hereby prayed, and may, upon his corporal oath, and according to the best of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make, but not under oath, his oath thereto being expressly waived to the interrogatories hereinafter numbered and set forth, which he is required to answer, that is to say:

43 Interrogatory 1st. What period during the life-time of Mrs. Sarah Ann Dorsey were you a member of her family at Beauvoir, Harrison County, Mississippi? Also during what period did the respective members of your own family reside there?

Interrogatory 2nd. What, to your knowledge, were the reasons inducing Mrs. Dorsey to entrust you, on May 10, 1878, with the respective powers "for and in her name to sue and be sued; to purchase, alienate, or encumber real estate situated anywhere; to borrow money, execute notes and other evidences of indebtedness," as granted by the notarial act of procuration passed before O. H. Violett, notary, on May 10, 1878, as set forth in Exhibit A?

Interrogatory 3d. What, to your knowledge, were the reasons inducing Mrs. Dorsey to pass the act of sale of February 19, 1879, as set forth in copy of said sale, Exhibit C? Why was no security, such as vendor's lien or special mortgage on the property, given by you to secure the payment of its price? What other, if any, property belonged to her

44 in which she might subsequently have resided? Was she not at the time of said transfer in embarrassed circumstances? Did you not at the time know that she had often complained of such embarrassment? Was there not at the time of sale an inventory, list, or statement of the various articles of personal property contained in the residence made out? If yea, please annex the same to your answers. What disposition, since the death of Mrs. Dorsey, have you made of the said articles?

Interrogatory 4th. At the time of the writing of your petition to the second district court were you authentically aware of the facts stated therein, that the contents of the sealed envelope, subscribed as the will and testament of Mrs. Sarah Ann Dorsey, was dated January 4th, 1878, and that by it you were instituted her legatee and executor?

Interrogatory 5th. When, where, and under what circumstances had you the first interview with Mrs. Dorsey as to your becoming a member of her family at Beauvoir?

Interrogatory 6th. Previous to the year 1876 had you or any member of your family been intimately and socially acquainted with Mrs. Dorsey? If so, where, and during what period?

Interrogatory 7th. Either before or soon after your arrival at Beauvoir, had you an opportunity of judging of Mrs. Dorsey's feelings toward her sister, brothers, and nieces? If, yea, what were her feelings? Were they not substantially as stated in this bill? If not, wherein and as to which ones of said relations did they differ from said statement?

Interrogatory 8th. At the time your petition was written asking, as universal legatee, to be put in possession of Mrs. Dorsey's estate, did you not have some knowledge, notice, information, or suspicion, or reason for belief or suspicion, and in your conscience believe and suspect, that orators, or some of them, would or might desire to contest the validity of her said will and its bequest to you when they should have been made fully aware of its contents? And why did you not qualify as executor, in order that such contest, if desired, might be raised against you as executor previous to the estate being surrende'd to you as universal legatee? Or why did you not allow a reasonable time to elapse for such contest to be made previous to asking for such possession?

Interrogatory 9th. On or before January 4th, 1878, had you any knowledge, notice, information, belief, or suspicion, or reason for belief or suspicion, or in your conscience believe or suspect, that Mrs. Dorsey intended to institute you her sole heir? If yea, state the source of such knowledge, &c., and reason for such belief, &c.

Interrogatory 10th. Assuming that Mrs. Dorsey, on January 4, 1878, to have been of sound and disposing mind, and assuming her feelings to her next of kin and presumptive heirs to have been substantially as set forth in this bill, or as you after your arrival at Beauvoir understood them to be, is it in your opinion, judging by your knowledge of the springs of human actions and the natural effect of such feelings, reasonable to believe that she would have bequeathed the entirety of her estate to a person in no way related by blood or marriage to her, to the entire exclusion of her next of kin, even to the extent of a kind remembrance, or family souvenir, plate, or jewel? If so, please state fully the reasons for such opinion.

Interrogatory 11th. In like manner, assuming Mrs. Dorsey to have been of sound and disposing mind, is it reasonable to believe that she would have removed, without any apparent cause, her brother as agent, and without consulting with one who for years has been her husband's and her own steadfast friend and constant adviser, as was Dr. I. Y. Hollingsworth, have granted to another such full and absolute power of disposal of her property as was that of May 10th, 1878, being Exhibit A; or would have transferred her title to her homestead; or, if so, at the price and on the terms and conditions, not including even a vendor's lien or special mortgage on the property sold, as she assumed to do by the act of sale of February 19, 1879, as per Exhibit C? If so, please state fully your reasons for such opinion; and also please state what motive actuated you in allowing her to grant to you such

unlimited agency and such a transfer of her property, and during the time you held such power of attorney, and without your advising with Dr. I. Y. Hollingsworth, or some of her relations or friends, if you did not, in regard thereto.

Interrogatory 12th. What property, immovable and movable, had Mrs. Dorsey at the time, May 10, 1878, you became her agent? What were at that time her debts? What were her debts and to whom owed at her death? What debts of her estate have you paid since the 15th July, 1879? What and to whom have you disposed of any of said mov-
49 able and personal property, including books, furniture, plate, jewels, clothing, &c., since Mrs. Dorsey's death? What were the annual net revenues of Mrs. Dorsey's during your said agency?

And that said defendant answer all and singular the matters and charges aforesaid as fully and particularly in every respect as if the same were here again repeated and he thereto particularly interrogated.

And that it may be decreed that the said alleged will of the said Sarah Ann Dorsey, dated "Beauvoir, Harrison County, Mississippi, January 4, 1878," and filed in the second district court for the parish of Orleans in the record of her succession under No. 41376 of the docket, on the 15th July, 1879, be cancelled and annulled as absolutely void and of no effect in law; and that the decree of probate of said alleged will, and the decree recognizing said defendant to be the sole and universal legatee of said Sarah Ann Dorsey, and as such ordered to be put in possession of all the property left by her, wherever situated, both
50 rendered on said 15th July, 1879, and in extenso set forth in Exhibit B, be revoked, cancelled, and recalled as absolutely void and of no effect in law and that the alleged sale and conveyance of property situate in Harrison County, Miss'ippi, by said Mrs. Dorsey to defendant, on the 19th February, 1879, and in extenso set forth in Exhibit C, be cancelled and annulled as absolutely void and of no effect in law, in so far as either said will, decree of probate, decree of possession, or sale, in any manner to be plead' by defendant as recognizing him as testamentary heir and universal legatee of said Sarah Ann Dorsey, or as a muniment of title or legal bar against your orators or their coheirs as her legal and sole heirs, and as such entitled to the ownership and possession of all and singular the property belonging to her estate, and which in any manner has come into the possession of said defendant, either as agent or trustee.

And that it be further decreed that said defendant come a
51 full and fair account of all and singular his acts and doings of his agency under the said act of procuration of May 10th, 1878; and that it be decreed the defendant furnish to this honorable court a full and detailed statement of all properties, real and personal, of said Sarah Ann Dorsey which came into his possession or under his control and management as her agent, or of which he has taken possession under and by virtue of said alleged will or said decrees of the second district court of July 15th, 1879, or said alleged sale of February 19, 1879.

And that it be further decreed that said defendant at once surrender unto orators, and, if so desired by them, jointly with their coheirs, the possession of all said property, including all books, papers, evidences, title-deeds, &c., which, belonging to said estate, at any time since May 10, 1878, has come into his possession.

And that defendant be perpetually enjoined and restrained
52 by the decree of this court from setting up or pleading said alleged will, said decree of probate, said decree of possession, and said act of sale, or any title, right, or claim thereunder, against your orators as next of kin and legal heirs of said Mrs. Sarah Ann Dorsey.

And that it be further decreed that defendant make a full and true discovery and disclosure of and concerning all and singular the transactions and matters appertaining to or connected with his said agency, as well during the life-time as since the death of his principal. And that defendant may be decreed to come to an account with your orators, to be taken by and under the direction and decree of this honorable court, of all his dealings and transactions under the agency assumed by him under the act of procuration of May 10th, 1878, or as trustee since Mrs. Dorsey's death, and to pay over to orators what shall be found due to them by defendant upon the taking of said account.

53 And inasmuch as said Mary Ruth Ellis is a minor, and as also her mother, widow Thomas L. Ellis, are citizens and residents of the State of Pennsylvania, and as orators are informed said Mary Ruth is unrepresented by any duly qualified tutor or guardian, and said S. Adolphe Dahlgren is a resident and citizen of the State of Tennessee, and who, though fully and substantially agreeing with orators in regard to the truth of the several articulations, allegations, and charges herein before set forth in this bill, yet, through personal reasons, is unwilling and declines to become a party herein, your orators pray, if, in the discretion of the court, it should be necessary or advisable, that said Mary Ruth Ellis, through proper representation, and said T. Adolphe Dahlgren, may be made parties complainant in this bill, in order that the rights of your orators in the premises may not be defeated; and they aver that they are ready and willing to give to their said coheirs full and adequate security against
54 any and all damages and costs for which they may be liable by reason of being so made parties to this bill, in such amount and in such form as your honors shall direct.

And may it please your honors to grant unto your orators the writ of subpœna, in due form of law, to be directed to the said defendant, who is now in the city of New Orleans, commanding him, by a certain day and under a certain penalty therein to be inserted, to be and appear before this honorable court, and then and there to answer the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as shall be agreeable to equity and good conscience, and as to your honors shall seem meet.

And your orators will, as in duty bound, ever pray, etc.

(Signed) WM. REED MILLS, *Solicitor.*

CLERK'S OFFICE.

I certify the

55 *Exhibit A.—Filed with bill December* 12, 1879.

STATE OF LOUISIANA,

Parish of Orleans, City of New Orleans:

Be it known that on this the tenth day of the month of May, in the year of our Lord one thousand eight hundred and seventy-eight, and of

the Independence of the United States of America the one hundred and second, before me, Oscar H. Violet, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and sworn, and in presence of the witnesses hereinafter named and undersigned, personally came and appeared Mrs. Sarah A. Dorsey, widow, a resident of the county of Harrison, State of Mississippi, who declared that, reposing special faith, trust, and confidence in the ability, fidelity, and integrity of Jefferson Davis, also a resident of the State of Mississippi, she has nominated, constituted, and appointed, and by these presents nominates, constitutes, and appoints, him, the said Jefferson Davis, her special agent and attorney in fact, with full and complete power and authority to transact for and in her name and stead, either in the State of Mississippi or Louisiana,
56 and in both of said States or elsewhere, any and all business appertaining to her.

She specially authorizes him to, for and in her name, sue and be sued, to purchase, lease, alienate, or encumber real estate situated anywhere, to borrow money, to execute notes or other evidences of indebtedness, effect insurance, and in short to do and perform any and all acts in relation to her property, both real and personal, which she could lawfully do in person.

And she hereby recognizes and ratifies, and binds herself, her heirs, and executors and administrators, to recognize and ratify, any and all of the acts of the said Jefferson Davis done in conformity herewith, and declares that they have, and shall continue to have, the same binding force and effect as if done and performed by herself in person.

And she hereby revokes any and all powers of attorney by her executed of date previous hereto.

Also personally came and appeared Jefferson Davis, who, having taken cognizance of the provisions here expressed, accepts the powers herein conveyed and this act of mandate.

This done, passed, and signed at my office, in the city of New
57 Orleans, in presence of Joseph A. Walker and Edward W. Burbank, competent and lawful witnesses, who have signed these presents, together with the mandator and mandatee, and before me, notary, on the day and date first above written.

(Signed) SARAH A. DORSEY.
" JEFFERSON DAVIS.

(Signed) J. A. WALKER.
" E. W. BURBANK.
(Signed) O. H. VIOLET,
Notary Public, Parish of Orleans, La.

I, the undersigned, custodean of notarial records for the parish of Orleans, State of Louisiana, hereby certify the foregoing to be a true copy of the original act of procuration passed before O. H. Violet, notary public, dated 10th May, 1878, which said original procuration is now in my possession as custodean aforesaid.

New Orleans, Nov. 29, 1879.

[SEAL.] (Signed) JOHN B. COFFEY,
Deputy Custodean of Not'l Records.

Exhibit B, referred to in and filed with bill of complaint December 12, 1879

STATE OF LOUISIANA,
United States of America:

Second district court for the parish of Orleans, city of New Orleans, parish of Orleans.

58 SUCCESSION OF MRS. S. A. DORSEY. } No. 41376.

Petition to open sealed packet.—Filed July 10, 1879.

Second district court.

SUCCESSION OF MRS. SARAH A. DORSEY. }

To the honorable A. L. Tissot, judge of the second district court for the parish of Orleans:

The petition of C. L. Walker, a resident and attorney at law of this city of New Orleans, with respect represents that on the 4th day of July, 1879, Mrs. Sarah A. Ellis, widow of Samuel W. Dorsey, deceased, aged fifty years four months and sixteen days, died at the Saint Charles Hotel, in this city.

Your petitioner further represents that there exists a certain sealed envelope deposited, in the hands of Mr. J. U. Payne, in this city, which package is supposed to contain a writing or the last will and testament of the deceased. Wherefore petitioner prays that the court may cause the said package to be opened and examined, and for such other proceedings as may be required.

(Signed) C. L. WALKER.
N. O., 10*th July*, 1879.

Order to open sealed packet, endorsed on foregoing petition.

59 Let the sealed packet within mentioned be opened in open court, at New Orleans, on July 15th, 1879.
Signed at New Orleans, July the 11th, 1879.
(Signed) A. L. TISSOT, *Judge.*

Petition to prove will.—Filed July 15, 1879.

Second district court.

SUCCESSION OF MRS. S. A. DORSEY. } No. 41376.

To the honorable A. L. Tissot judge of the second district court for the parish of Orleans:

The petition of Jefferson Davis, who resides at Beauvoir, county of Harrison, State of Mississippi, with respect represents that by the terms

of the last will and testament of Mrs. Sarah A. Dorsey, deceased, dated the fourth day of January, 1878, your petitioner is made the executor and legatee of the deceased, which said will has this day been filed in this court, and is now herewith presented for proof according to law. Wherefore your petitioner prays that the said last will and testament of Mrs. Sarah A. Dorsey, deceased, be duly probated according to law.

(Signed) BRÉAUX, FENNER & HALL,
" C. L. WALKER,
Att'ys for Petitioner.

N. O., *July* 15, 1879.

60 *Order to prove will, endorsed on foregoing petition.*

Let the last will and testament of the deceased be proved before me forthwith.

New Orleans, July 15, 1879.

(Signed) A. L. TISSOT, *Judge.*

Will—Filed July 15, 1879.

JANUARY 4TH, 1878,
Beauvoir, Harrison County, Mississippi.

I, Sarah Anne Dorsey, of Tensas Parish, Louisiana, being aware of the uncertainty of life, and being now in sound health of mind and body, do make this my last will and testament, which I write, sign, and seal with my own hand in the presence of three competent witnesses, as I possess property in the States of Louisiana, Mississippi, and Arkansas. I owe no obligation of any sort whatever to any relative of my own. I have done all I could for them during my life. I therefore give and bequeath all my property, real, personal, and mixed, wherever located and situated, wholly and entirely, without hindrance or qualification, to my most honored and esteemed friend, Jefferson Davis, ex-president of the Confederate States, for his own sole use and benefit, in fee-simple forever, and I
61 hereby constitute him my sole heir, executor, and administrator.

If Jefferson Davis should not survive me, I give all that I have to his youngest daughter, Varina.

I do not intend to share the ingratitude of my country towards the man who is in my eyes the highest and noblest in existence.

In testimony whereof I sign this will, written with my own hand, in the presence of W. T. Walthall, F. S. Hewes, and John C. Craig, subscribing witnesses, resident in Harrison County, Mississippi.

(Signed) SARAH ANNE DORSEY.

At Mississippi City, on this fourth day of January, eighteen hundred and seventy-eight, the above-named Sarah Anne Dorsey signed and sealed this instrument, and published and declared the same as and for her last will and testament, and we in her presence and at her request, and in the presence of each other, have hereunto subscribed our names as witnesses.

(Signed) W. T. WALTHALL.
" F. S. HEWES.
" JOHN C. CRAIG.

Proces verbal of opening packet, July 15, 1879.

Be it remembered that on this fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and
62 the 104th of the Independence of the United States of America, upon the application of Jefferson Davis, and pursuant to my decree bearing date this day, before me, Aristide L. Tissot, judge of the second district court for the parish of Orleans, personally came and appeared Messrs. William T. Walthall and Frederick S. Hewes, who, being duly sworn, were by me presented with an instrument of writing, written on three pages of a double sheet of letter paper, beginning with the following words, viz, "January 4, 1878, Beauvoir, Harrison County, Mississippi," and ending with the following, "at *the* request, and in the presence of each other, have hereunto subscribed our names as witnesses. (Signed) W. F. Walthall, T. S. Hewes, John C. Craig," did declare and say that they recognize the aforesaid document as being the same which was presented to them and to the other subscribing witnesses at Mississippi City, in the State of Mississippi, on the fourth day of January, eighteen hundred and seventy-eight, by Mrs. Sarah Anne Dorsey, with the declaration that the same was her last will and testament; that the said will was then signed by the said testatrix in their presence and in that of the other subscribing witnesses, and then signed by themselves
63 and the said other subscribing witnesses in the presence of the said testatrix and in the presence of each other. Appearers further declare that John C. Craig, one of the subscribing witnesses to the aforesaid will, has died since the execution of said will. Appearers further declare that at the time of the execution of said will the subscribing witnesses thereto were of lawful age, and residents of the county of Harrison, Mississippi. Appearers further declare that at the time of the execution of the aforesaid will the testatrix, Mrs. Sarah Anne Dorsey, fem'e sole, *of* over twenty-one years of age, and of sound and disposing mind.

And the said appearers did hereunto set their hands, after due reading hereof, on the day, month, and year first above written.

(Signed) W. T. WALTHALL.
" F. S. HEWES.

Sworn to and subscribed before me this 15th July, 1879.
(Signed) A. L. TISSOT, *Judge.*

Proof and probate of will, July 15, 1879.

Be it remembered that on this fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and the one
64 hundred and fourth year of the Independence of the United States of America, upon the application of Jefferson Davis, and pursuant to my decree bearing date this day, before me, Aristede L. Tissot, judge of the second district court for the parish of Orleans, personally came and appeared MM. William T. Walthall, Clement L. Walker, and J. U. Payne, witnesses, who, being duly sworn, were by me presented with a sealed packet, sealed and closed with red sealing-wax, and bearing the following superscription, to wit, "Last will and testament of Sarah Anne Dorsey, of Tensas Parish, Louisiana," did declare and say that the said superscrip-

tion is in the proper handwriting of the late Mrs. Sarah Anne Dorsey. Whereupon the said packet being by me broken open was found to contain an instrument of writing, written on three pages of a double sheet of letter paper, beginning with the following words, "January 4th, 1878, Beauvoir, Harrison County, etc.," and ending with the following, "as witnesses. (Signed) W. T. Walthall, F. S. Hewes, John C. Craig," and purporting to be the olographic last will and testament of the said Mrs. Sarah Anne Dorsey, which being by me exhibited to the aforesaid witnesses, was
65 by them recognized and declared to be entirely written, dated and signed by the testatrix, the said Mrs. Sarah Anne Dorsey, except the three last signatures, purporting to be the signatures of the said witnesses, which they attest as having seen her write and sign during her life-time; and the said appearers did hereunto set their hands, after due reading hereof, on the day, month, and year first-above written.

(Signed) W. T. WALTHALL.
C. L. WALKER.
J. U. PAYNE.

Sworn to and subscribed before me this 15th day of July, 1879.
(Signed) A. L. TISSOT, *Judge.*

Whereupon I, the said judge, do hereby declare the said olographic last will and testament to be truly proved; and having read the said will in a loud and distinct voice to the aforesaid witnesses, and in the presence of Messrs. Chas. E. Fenner and A. J. Villeré, all present in court, and after having signed the said will ne varietur at the beginning and end of each page thereof, do now order the same to be deposited and recorded in the office of the clerk of the second district court for the parish of
66 Orleans and that the execution thereof take place according to law.

Done in the second district court for the parish of Orleans, this fifteenth day of July, 1879.

(Signed) CHAS. E. FENNER.
Do A. J. VILLERÉ.
Do A. L. TISSOT, *Judge.*

Petition to be put in possession.—Filed July 15, 1879.

Second district court for the parish of Orleans.

SUCCESSION OF SARAH ANNE DORSEY. } No. 41376.

The petition of Jefferson Davis, who resides Harrison County, State of Mississippi, respectfully shows, that by the terms of the last will of Mrs. Sarah Anne Dorsey, duly proved and registered in this court, your petitioner is constituted the sole executor and also the universal legatee of deceased. That said Mrs. Sarah Anne Dorsey left no descendants or ascendants, and therefore no forced heirs; and that petitioner is therefore entitled to the immediate seizin and possession of the estate; that said deceased owed no considerable debts; that petitioner is willing to accept the succession purely and simply, without benefit of inventory, and that there is no necessity of further administration. Wherefore petitioner prays your

honor may make order recognizing petitioner as sole and universal
67 legatee of Mrs. Sarah Anne Dorsey, deceased, and putting him in possession of her estate real and personal and mixed, and for all further proper order in the premises.

(Signed) BREAUX, FENNER & HALL,
Do C. L. WALKER,
Attorneys of Petitioner.

Affidavit on foregoing petition.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally appeared Mrs. Eliza Ogden Cochran, Jacob U. Payne, and Joseph R. Davis, who, being duly sworn, declare that they knew intimately the late Mrs. Sarah Anne Dorsey during her life-time, and that she leaves no descendants or ascendants surviving her, and that, to the best of their knowledge and belief, she leaves no considerable debts.

(Signed) ELIZA OGDEN COCHRAN.
Do. JOS. R. DAVIS.
Do. J. U. PAYNE.

Sworn to and subscribed before me this 15th day of July, 1879.
(Signed) A. L. TISSOT, *Judge.*

Judgment.—July 15, 1879.

SUCCESSION OF
MRS. SARAH ANNE DORSEY. } No. 41376.

On petition of universal legatee to be recognized, &c.

The law and the evidence being in favor of the petitioner, it is ordered that said petitioner, Jefferson Davis, be recognized as the sole and
68 universal legatee of the late Mrs. Sarah Anne Dorsey, and as such be put in possession of all the property, real, personal, or mixed, left by the said late Mistress Sarah Anne Dorsey, and wherever situated.

Judgment rendered and signed July 15, 1879.
(Signed) A. L. TISSOT, *Judge.*

UNITED STATES OF AMERICA,
State of Louisiana:

Second district court for the parish of Orleans.

I, John Herbert, clerk of the second district court for the parish of Orleans, do hereby certify that the foregoing 14 pages contain a true and correct copy of the whole proceedings had in this court in the matter of the succession of Mrs. Sarah Anne Dorsey, No. 41376 of the docket of this court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this twenty-fourth day of November, in the year of our Lord one thousand eight hundred and sev-

enty-nine, and in the 104th year of the Independence of the United States of America.

[SEAL.] (Signed) JOHN HERBERT, *Clerk.*

I, A. L. Tissot, sole judge of the second district court for the parish of Orleans, do hereby certify that John Herbert is the clerk of said
69 court; that the same is a court of record having probate jurisdiction, and that the signature, John Herbert, clerk, to the foregoing certificate is in the proper handwriting of him, the said John Herbert, clerk; to his official acts as such full faith and credit are due and owing. And I do further certify that his attestation is in due form of law.

Given under my hand, at the city of New Orleans, on the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and seventy-nine.

(Signed) A. L. TISSOT, *Judge.*

I, John Herbert, clerk of the second district court for the parish of Orleans, do hereby certify that A. L. Tissot, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, sole judge of the second district court for the parish of Orleans, duly elected and commissioned and qualified as such; and that said attestation is in due form of law.

Witness my hand and the seal of said court this 24th day of November, 1879.

[SEAL.] (Signed) JOHN HERBERT, *Clerk.*

Exhibit C, referred to in and filed with bill of complaint, December 12, 1879.

70 This indenture, made and entered into this 19th day of February, A. D. 1879, between Sarah A. Dorsey, of the county of Harrison, State of Mississippi, of the one part, and Jefferson Davis, of the same county and State, of the other part, witnesseth:

That the said Sarah A. Dorsey, for and in consideration of the sum of five thousand five hundred dollars, to be paid as follows, one thousand 1st January, A. D. 1880; two thousand 1st January, 1881; two thousand and five hundred dollars on the 1st Jan., 1882; for which Jefferson Davis has given his several promissory notes under seal, bearing date the day and year above written, and payable as above named, by these presents hath granted, bargained, sold, and conveyed, and doth by these presents grant, bargain, sell, and convey, unto the said Jefferson Davis, his heirs and assigns, forever, all of the tracts and parcels of land lying and being in the said county of Harrison, State aforesaid, and known and designated as follows: The E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of section 25, township 7 south, of meridian west, containing one hundred and twenty acres; also the undivided one-half of the northwest $\frac{1}{4}$ of the SW. $\frac{1}{4}$ Sec. 25, T. 7 south, of range 10 west, containing $40\frac{3}{100}$ acres; also lot No. 3, in fractional section No. (5) five, containing $80\frac{70}{100}$ acres;
71 and lot No. 1, in fractional section thirty-four (34), of *of* $80\frac{57}{100}$ acres, in T. 7, range 10 west; also W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of W. $\frac{1}{2}$ of section No. 24, and E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 27, township 7, R. 10 west, containing two hundred and forty acres (240) $\frac{15}{100}$; also E. $\frac{1}{2}$ of

SW. ¼ and SE. ¼ of NW. ¼ of Sec. 26, T. 7, R. 10 west, containing 120 $\frac{07}{100}$ acres; also a lot of , at West Biloxi, described as follows: said lot fronting the seashore, and designated as lot No. 14, measuring one and one-half arpents front by eight arpents deep—all of said lands and lots situated in the county and State aforesaid, being the lands formerly owned by James Brown and sold under a decree of the United States court; also all the household and kitchen furniture and all the personal property now in said dwelling-house and on said lands, except the pictures, engravings, books, and silver-plate and ware, piano, harp, and all articles of virtu, and an old horse known as Rupert, together with all and singular the tenements and hereditaments thereunto belonging or in any wise appertaining to the above-described lands:

To have and to hold the above granted and bargained premises, with the appurtenances, unto the said Jefferson Davis, his heirs and assigns, forever.

In testimony whereof the said Sarah A. Dorsey has hereunto set
72 her hand and seal the day and year above written.

(Signed) SARAH ANNE DORSEY. [SEAL.]

STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me, F. S. Hewes, clerk of the chancery court of Harrison County, the within-named Sarah A. Dorsey, who acknowledged that she signed, sealed, and delivered the foregoing deed, on the day and year mentioned, as her act and deed.

Given under my hand and official seal, at Mississippi City, this 19th day of Feb'y, 1879.

[SEAL.] (Signed) F. S. HEWES, *Clerk.*

STATE OF MISSISSIPPI,
Harrison County, ss:

I, F. S. Hewes, clerk of the chancery court of said county and State, do hereby certify that the instrument of writing and the certificate of the acknowledgment thereof, of which the foregoing is a correct record, was filed in my office for record at 4½ o'clock p. m. on the 19th day of February, 1879, and duly recorded in the said office, on the day of the date hereof, in record of deeds, book No. 16, page 328.

Witness my hand and seal of said court, at Mississippi City, this the 20th day of February, A. D. 1879.

[SEAL.] (Signed) F. S. HEWES, *Clerk.*

THE STATE OF MISSISSIPPI,
Harrison County, ss:

73 I, F. S. Hewes, clerk of the chancery court of said county, do hereby certify that the annexed and foregoing three pages and part of this contain a true and perfect transcript of the record of a deed of conveyance from Sarah A. Dorsey to Jefferson Davis, dated 19th February, 1879, as the same remains of record in my office, in record of deeds, book No. 16, pages 328 & 329.

Witness my hand and seal of said court, at Mississippi City, this 17th day of October, A. D. 1879.

[SEAL.] (Signed) F. S. HEWES, *Clerk.*

Subpœna in chancery to Jefferson Davis.—Issued December 12, 1879.

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the district of Louisiana, greeting:

You are hereby commanded to summon Jefferson Davis to appear before the honorable the judges of the fifth judicial circuit of the United States of America, at a circuit court to be holden on the first Monday of February, 1880, then and there to answer a bill in chancery filed against him, wherein Stephen Percy Ellis and others are complainants and said Jefferson Davis is defendant. Herein fail not, and have you then and
74 there this writ, with your endorsement thereon how you have executed the same.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 12th day of December, in the year of our Lord one thousand eight hundred and seventy-nine, and the 104 year of American Independence.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

The defendant is hereby notified that he is required to enter his appearance in the clerk's office of the United States circuit court on or before the first Monday of February, 1880; otherwise the bill may be taken pro confesso.

(Signed) F. A. WOOLFLEY, *Clerk.*

Marshal's return.

Received Dec. 12, 1879, by the U. S. marshal, and on the 19th day of the same month and year I served a true copy of the within subpœna in chancery on the defendant, Jefferson Davis, in person, in the city of New Orleans.

Returned Dec. 19, 1879.

(Signed) JACK WHARTON, *U. S. Marshal.*

Appearance of defendant.—Entry in chancery order-book, January 15, 1880.

75 STEPHEN PERCY ELLIS ET ALS. *vs.* JEFFERSON DAVIS. } No. 8934.

Jefferson Davis, the defendant herein, by his solicitors Breaux, Fenner, & Hall and E. H. Farrar, has this day entered his appearance to complainants' bill of complaint.

Entry at rules.—Extract from chancery order-book, January 15, 1880.

STEPHEN PERCY ELLIS ET ALS. *vs.* JEFFERSON DAVIS. } No. 8934.

Jefferson Davis, the defendant herein, by Breaux, Fenner & Hall and E. H. Farrar, his solicitors, has this day filed his demurrer to the complainants' bill of complaint, and sets the same for argument.

Demurrer.—Filed January 15, 1880.

STEPHEN PERCY ELLIS ET ALS.
vs.
JEFFERSON DAVIS. } No. 8934.

In the circuit court of the United States, district of La. In equity.

The demurrer of Jefferson Davis to the bill of complaint of the complainants herein.

This defendant, by protestation, not confessing any or all of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer showeth:

1. That it appears by said complainants' own showing by their
76 said bill that the cause of action in said bill set forth, if any accrued to the said complainants, is within the exclusive jurisdiction of the honorable the second district court for the parish of Orleans, and not within the jurisdiction of this court, and this court ought not to take cognizance thereof. And in case the foregoing demurrer should not be sustained (2), then to so much and such parts of said bill as seeks to have the will of the late Mrs. Sarah Ann Dorsey cancelled and annulled, and the judgment decreeing the probate thereof set aside and annulled, on the ground that the said will was written, dated, and signed by said Mrs. Sarah Ann Dorsey when under the undue influence of this defendant, this defendant doth demur in law, and for cause of demurrer showeth that said allegations, if true, which defendant denies, would not sustain the relief sought, nor any part thereof.

3. And to so much and such parts of said bill as seeks to have said will and the judgment admitting the same to probate cancelled and annulled on the ground that the motive and object inducing and controlling said testatrix to make said bequest to said defendant, as well as the said bequest itself, were under the law of the land illegal, null, and void, this defendant doth demur in law on the ground that the nature of the
77 motive and object as set forth in said bill cannot be inquired into, and if the same were such as therein set forth they would not sustain the relief sought, or any part thereof.

4. And to so much and such parts of said bill as seeks to cancel and annul the sale made by said Mrs. Dorsey to the defendant of the "Beauvoir" estate, on the ground that because of his agency, therein fully set forth, this defendant had no legal right to purchase said property, this defendant doth demur in law, and for cause of demurrer showeth that said allegations, if true, would furnish no grounds for the relief sought, or any part thereof.

5. And to so much and such parts of said bill as seeks to have the said will and the judgment admitting the same to probate cancelled and annulled on the grounds that previous to and at the time of writing the same said Sarah Anne Dorsey was not of sound and disposing mind, this defendant doth demur in law, and for cause of demurrer showeth that the said general allegation is contradicted by the admission made in said bill by said complainants, that said Mrs. Dorsey "possessed a high order

of intelligence," and that the particular allegations of said bill in support of said general allegation, if true, would not support or establish
78 the truth thereof, and would not sustain the relief sought, nor any part thereof.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur to said bill and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to said bill, and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Signed) BREAUX, FENNER & HALL,
Do. E. H. FARRAR,
Solicitor for Jefferson Davis.

We certify that in our opinion the foregoing demurrer of Jefferson Davis, defendant, to the bill of complaint of complainants herein is well founded in law, and proper to be filed in the above cause.

(Signed) BREAUX, FENNER & HALL,
Do. E. H. FARRAR,
Sol'rs for Defendant.
Do. C. L. WALKER, *Of Counsel.*

Chas. E. Fenner, being duly sworn, does depose and say that he has read the foregoing demurrer, and that the same is not interposed for the purpose of delaying the suit or any of the proceedings therein.

(Signed) CHAS. E. FENNER.

Sworn & subscribed to before me this 15th day of January, 1880.

(Signed) T. V. COUPLAND,
D'y Clerk.

79 *Order: Demurrer fixed.—Extract from the minutes, November term,* 1879.

NEW ORLEANS,
Thursday, January 15, 1880.

Court met pursuant to adjournment.
Present, Hon. E. C. Billings, district judge.

STEPHEN PERCY ELLIS & AL. *vs.* JEFFERSON DAVIS. } No. 8934.

On motion of Breaux, Fenner & Hall and E. H. Farrar, solicitors for the defendant, ordered that the demurrer herein be set down for argument on Saturday, 24th instant, at 11 a. m., and that counsel for complainant be notified thereof.

Submission of demurrer.—Extract from the minutes of Jan'y 24, 1880.

STEPHEN PERCY ELLIS & AL. *vs.* JEFFERSON DAVIS. } No. 8934.

This cause came on to be heard upon the demurrer herein filed by the

defendant, and having been argued by Breaux, Fenner & Hall and E. H. Farrar for defendant, and Wm. R. Mills for complainant, the court took time to consider.

Order: Demurrer sustained, bill dismissed.—Extract from the minutes of March 8, 1880.

STEPHEN P. ELLIS & AL.
vs.
JEFFERSON DAVIS. } No. 8934.

This cause came on to be heard upon the demurrer of the defendant to the bill of complaint of the complainants herein, and was argued by
80 counsel; on consideration whereof it is ordered, adjudged, and decreed that the said demurrer be sustained and the said bill of complaint be dismissed without prejudice, at the costs of the complainants.

March 8th, 1880.

(Signed) W. B. WOODS, *Judge.*

Petition for rehearing.—Filed March 18, 1880.

STEPHEN P. ELLIS & AL.
vs.
JEFFERSON DAVIS. } No. 8934.

United States circuit court, district of La.

To the honorable the judges of said court:

The petition of Stephen Percy Ellis, T. Adolph Dahlgren, Edward Peckham, and Ruth Ellis, his wife, complainants, respectfully represents that they desire a rehearing of the demurrer herein before filed by defendant to the bill of complaint and sustained by this hon. court in its judgment of the 8th inst., and a reasonable time within which to file their grounds and reasons for such rehearing in the premises. Wherefore they respectfully pray for such rehearing, and that a reasonable time be allowed them within to file their reasons and grounds therefor.

(Signed) WM. REED MILLS, *Solicitor.*

Order: Petition for rehearing fixed.—Extract from the minutes, April term, 1880.

NEW ORLEANS,
Thursday, May 20, 1880.

81 Court met pursuant to adjournment.
Present, Hon. Joseph P. Bradley, circuit justice.
" " Wm. B. Woods, circuit judge.

STEPHEN P. ELLIS & AL.)
vs.) No. 8934.
JEFFERSON DAVIS.)

On motion of Wm. Reed Mills, solicitor for complainants, ordered that the petition for a rehearing herein be set down for hearing on 22d inst. at 11 a. m., and that respondent's solicitors be notified thereof.

Order: Petition for rehearing refused.—Extract from the minutes of May 22, 1880.

STEPHEN P. ELLIS & AL.)
vs.) No. 8934.
JEFFERSON DAVIS.)

This cause came on to be heard on the petition of the complainants for a rehearing and was argued by the solicitors of the parties respectively. On consideration whereof it is ordered that a rehearing be, and the same is hereby, refused with costs.

Petition for appeal.—Filed September 17, 1880.

In the circuit court of the United States for the district of Louisiana.

STEPHEN P. ELLIS & AL.)
vs.) No. 8934.
JEFFERSON DAVIS.)

To the honorable the judges of said circuit court:

The petition of Stephen Percy Ellis, Inez Ruth Ellis, wife of Edward Peckham, and said Edward Peckham, and A. Mortimer Dahlgren,
82 complainants in the above-entitled and numbered cause, respectfully represents:

That they feel aggrieved by the judgment and decree rendered by this honorable court in this said cause, and signed on the 8th March, 1880, in favor of said defendant, Jefferson Davis, and against your petitioners.

That they are informed there is error in said judgment to their prejudice.

That, as shown by the record and by the annexed admission on part of defendant, the amount in controversy and dispute in said cause exceeds five thousand dollars, exclusive of costs.

That they desire to appeal from said final decree.

Wherefore complainants pray that they be allowed and granted an appeal from said final decree rendered in this cause to the Supreme Court of the United States, returnable on the second Monday of October, 1880, upon said complainants giving bond with security in amount as the court may determine, conditioned according to law.

(Signed) WM. REED MILLS,
Solicitor of Compl't.

Order.

The appeal prayed for in the foregoing petition is hereby allowed, this September 11, 1880.

(Signed) W. B. WOODS,
U. S. Circuit Judge.

Admission annexed to foregoing petition.

It is hereby admitted that the value of the estate referred to in
83 the bill of complaint herein exceeds the sum of twenty thousand ($20,000) dollars.

(Signed) C. L. WALKER,
Of Counsel for Mr. Jefferson Davis, Respondent.

Bond for appeal.—Filed September 17, 1880.

UNITED STATES OF AMERICA:

Know all men by these presents that we, S. Percy Ellis, of Brooklyn, New York, Inez Routh Ellis, and her husband Edward Peckham, of Tensas Parish, Louisiana, A. Mortimer Dahlgren, as principals, and Wm. Reed Mills as surety, are held and firmly bound jointly and severally unto Jefferson Davis, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said Jefferson Davis, heirs, executors, administrators, and assigns, for which payment well and truly to be made, we bind ourselves and each of us by himself and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated the eleventh day of September, in the year of our Lord eighteen hundred and eighty.

Whereas the said S. P. Ellis, Inez R. Ellis, Ed. Peckham, & A. Mortimer Dahlgren, having heretofore, to wit, on the eleventh day of September, 1880, taken an appeal to the Supreme Court of the United States, from and to reverse the decree rendered on the eighth day of March,
84 1880, by the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, in the suit of S. P. Ellis, Inez Routh Ellis, and Edward Peckham, her husband, and A. Mortimer Dahlgren are complainants and Jefferson Davis is defendant, No. 8943 of the docket thereof:

Now, the condition of the above obligation is, that if the above bounden S. P. Ellis, Inez R. Ellis, Ed. Peckham, and A. Mortimer Dahlgren, shall prosecute their said appeal to effect and shall answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

STEPHEN PERCY ELLIS,
INEZ ROUTH ELLIS,
EDWARD PECKHAM, &
A. M. DAHLGREN,
By their attorney, WM. REED MILLS.

(Signed) WM. REED MILLS. [L. S.]

Signed, sealed, and delivered in the presence of—
(Signed) JOHN C. EVE.

Approved Sep. 11, 1880.
(Signed) W. B. WOODS, *U. S. Judge.*

85 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify, that the foregoing 84 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had in the case of Stephen Percy Ellis and others, versus Jefferson Davis, No. 8934 of the docket of said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 21 day of September, A. D. 1880. Twenty-two words erased (null). Approved.

F. A. WOOLFLEY, *Clerk.*

I, W. B. Woods, United States judge for the district of Louisiana, do certify, that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 21st day of September, A. D. 1880.

W. B. WOODS, *Judge.*

86 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Jefferson Davis, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a petition and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Stephen Percy Ellis, Inez Routh Ellis, wife of Edward Peckham, said Edward Peckham, and A. Mortimer Dahlgren are complainants and appellants and you are defendant and appellee, to show cause, if any there be, why the judgment rendered against the said S. Percy Ellis, Inez Routh Peckham, Edward Peckham, & A. Mortimer Dahlgren as in said petition and order for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eleventh day of September, in the year of our Lord one thousand eight hundred and eighty.

W. B. WOODS, *U. S. Judge.*

87 (Indorsed:) United States circuit court. No. 8934. S. P. Ellis & als. vs. Jefferson Davis. Citation.

Marshal's return.

Received Sept. 17, 1880, by the U. S. marshal and on the same day, month, and year served a true copy of the within citation on the within-named Jefferson Davis, through his att'y and solicitor, E. Howard Farrar, esqr. by handing the same in person to said E. Howard Farrar, No .9 Carondelet street, in the city of New Orleans, the said Jefferson Davis being absent from the district at the time of service.

THOMAS BOSWELL,
D'y U. S. Marshal.

SEPT. 17TH, 1880.

Personally appeared before me, Thos. Boswell, a d'y U. S. marshal in and for the district of Louisiana, and makes oath that he served a copy of the within citation of appeal on the defendant and appellee herein named as set forth in his official return hereon.

THOMAS BOSWELL,
D'y U. S. Marshal.

SEP. 17TH, '80,

Subscribed and sworn before me this 20th Sept. 1880.

T. V. COUPLAND,
Commissioner United States Circuit Court,
District of Louisiana.

(Indorsement on cover:) No. 104. Stephen Percy Ellis, Inez Ruth Ellis, and her husband, Edward Peckham, and A. Mortimer Dalghren, appellants, vs. Jefferson Davis. Louisiana C. C. U. S. Filed October 11, 1880.

109-485

OFFICE SUPREME COURT U. S.
NOV 3 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 104.

IN CHANCERY.

STEPHEN PERCY ELLIS, ET ALS., APPELLANTS,

versus

JEFFERSON DAVIS.

Brief of Plaintiffs, Appellants.

WM. REED MILLS,
Solicitor.

L. Graham & Son, Stationers and Printers, 127 Gravier Street.

Marshal's return.

Received Sept. 17, 1880, by the U. S. marshal and on the same day, month, and year served a true copy of the within citation on the within-named Jefferson Davis, through his att'y and solicitor, E. Howard Farrar, esqr. by handing the same in person to said E. Howard Farrar, No .9 Carondelet street, in the city of New Orleans, the said Jefferson Davis being absent from the district at the time of service.

THOMAS BOSWELL,
D'y U. S. Marshal.

SEPT. 17TH, 1880.

Personally appeared before me, Thos. Boswell, a d'y U. S. marshal in and for the district of Louisiana, and makes oath that he served a copy of the within citation of appeal on the defendant and appellee herein named as set forth in his official return hereon.

THOMAS BOSWELL,
D'y U. S. Marshal.

SEP. 17TH, '80,

Subscribed and sworn before me this 20th Sept. 1880.

T. V. COUPLAND,
Commissioner United States Circuit Court,
District of Louisiana.

(Indorsement on cover:) No. 104. Stephen Percy Ellis, Inez Ruth Ellis, and her husband, Edward Peckham, and A. Mortimer Dalghren, appellants, vs. Jefferson Davis. Louisiana C. C. U. S. Filed October 11, 1880.

109-485

OFFICE SUPREME COURT U. S.
NOV 3 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 104.

IN CHANCERY.

STEPHEN PERCY ELLIS, ET ALS., APPELLANTS,

versus

JEFFERSON DAVIS.

Brief of Plaintiffs, Appellants.

WM. REED MILLS,
Solicitor.

L. Graham & Son, Stationers and Printers, 127 Gravier Street.

Supreme Court of the United States.

No. 104.

STEPHEN ELLIS, ET ALS., APPELLANTS,

versus

JEFFERSON DAVIS.

Brief of Plaintiffs, Appellants.

PLEADINGS.

These consist of a bill of complaint and a demurrer.

The Bill of Complaint, on pp. 1–16 of transcript, an abstract of which is also succinctly set forth on pp. 16, 17 and 18 of this brief, substantintially alleges:

That the complainants are next of kin and collateral heirs of Mrs. Sarah Ann Dorsey; that the defendant, under notarial act of procuration, dated May 10th, 1878, annexed to the bill as exhibit A (p. 16 of trans.), was her agent from said date up to the time of her death on July 4th, 1879; and complainants ask that the defendant be requested to render an account of his agency, and to surrender all such property, rights, credits, books, titles, deeds, etc., which, through said agency, came into his possession, and being real and

personal property situate in the States of Louisiana, Mississippi, and Arkansas, and as on pp. 1 and 2 of said bill is more fully described; as also to account as trustee for his management of said property, its fruits and revenues, since her death, which surrender of property and rendition of accounts, notwithstanding amicable defendant refuses to make;

That as a ground of such refusal said defendant *pretends* said Mrs. Dorsey, by a certain instrument in writing, dated the 4th January, 1878, at Harrison County, Mississippi, executed her certain olographic will by which he, the defendant, was constituted her sole testamentary heir and universal legatee; to which pretence the bill, while admitting the execution of such writing, alleges that said will in its entirety, and particularly as regard the bequest therein to said defendant, is null and void, for the grounds of substance in the bill set forth (trans. pp 4 *et seq.*), and, substantially, being;

That previous to and at the time of writing and signing the same, said Sarah Ann Dorsey was not of sound and disposing mind;

That the same was written and signed by her when under the undue influence of said defendant, and which said undue influence excited and aggravated the causes depriving her of a sound and disposing mind, rendering her more susceptible to such undue influence;

That the motive and object inducing and controlling said testatrix to make said bequest to said

defendant, as well as the said bequest itself, were, under the laws of the land, illegal, null and void;

That defendant, notwithstanding the nullity of said will, and his knowledge thereof, petitioned for and obtained on the 15th July, 1879, from the Judge of the Second District Court for the parish of Orleans, an ex-parte order for its probate and registry, and, immediately thereupon, petitioned for and obtained a further order, of same date, putting himself in possession of all the property, real, personal and mixed, left by Mrs. Dorsey and wherever situated; which said order of probate and order of possession were, in the premises, unadvisedly rendered. Exhibit B, probate proceedings, trans. pp. 18–23;

That defendant further pretends to have another muniment of title to that portion of his principal's estate known as "Beauvoir," situated in Hancock County, Mississippi, through a certain deed executed by her to him, on the 18th February 1879, (exhibit C, trans. p. 23); to which pretence the bill alleges that said deed is null and void and of no effect in law, for reasons not only as herein before charged as regards the nullity of the alleged will, that is, that at the execution of said deed, said Mrs. Dorsey was not of sound and disposing mind, that the said deed was executed by her when under the undue influence of the defendant, that the motive and object inducing and controlling said vendor to make said conveyance, as well

as said conveyance itself, were, under the laws of the land null and void; but also, for the additional reasons that under his said agency of May 10th, 1878, defendant had no legal right to purchase property thus within his absolute disposal, and that his consent to the sale of said property, under these circumstances, to himself, and without any security for the payment of its price, and which was below its value, was a flagrant violation of the trust thus assumed by him as agent, and of which pretended sale he cannot, morally or legally, claim any benefit from, and for which reasons the said pretended act of sale of February 19th, 1879, should be cancelled and annulled.

On the foregoing causes of action, complainants pray that said alleged testament and deed be declared null; said orders of probate and possession revoked, as unadvisedly rendered, in so far as either said will, orders of probate and possession, and said deed, in any manner to be plead by defendant as recognizing him as testamentary heir, or as a muniment of title or legal bar against the demand of complainants; that defendant be required to surrender to them said property, and render an account of his said agency; and for such further order and decree as shall be agreeable to equity and good conscience.

The demurrer, to be found on page 26 of transcript, sets forth substantially as grounds therefor:

1. That the cause of action in said bill set forth, if

any, is within the exclusive jurisdiction of the Second District Court for the parish of Orleans, and not within the Circuit Court of the United States, for the district of Louisiana.

2. That the allegations in the will that said will was written, dated and signed by Mrs. Dorsey when under the undue influence of the defendant, if true, would not constitute a cause of nullity.

3. That the allegation that the motive and object inducing and controlling said testatrix to make said bequest to said defendant, as well as said bequest itself, were, under the laws of the land, illegal, null and void, if true, would not constitute a cause of nullity.

4. That the allegation of the defendant being at the time the agent of Mrs. Dorsey would not, if true, be a ground to cancel and annul the sale made by her to him on the 19th February, 1879, of the "Beauvoir" estate.

5. That the general allegations that previous to and at the time of said will, Mrs. Dorsey was not of sound and disposing mind, is contradicted by the admission made in the will, that said Mrs. Dorsey "possessed a high order of intelligence," and that the particular allegations of said bill in support of said general allegations would not constitute a ground of nullity.

On hearing it was "ordered, adjudged and decreed "that the said demurrer be sustained, and the said bill

"its powers and rights to be supreme. It would be a "perfect solecism to affirm, that, a national government "should exist with certain powers; and yet, that in "the exercise of those powers it should not be supreme." Story's Commentaries, § 1837.

By article third of the Constitution, it is declared that: "the judicial power of the United States, shall "be vested in one Supreme Court, and in such Inferior "Courts as the Congress may from time to time ordain "and establish."

The scope and extent of this judicial power are embraced in the second section of the article which provides that "the judicial power shall extend *to all cases, in law and equity*, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; *to* all *cases* affecting ambassadors, other public ministers, and consuls; *to* all *cases* of admiralty and maritime jurisdiction; to controversies to which *the* United States shall be a party; TO CONTROVERSIES between two or more States; between a State and citizens of another State; *between citizens of* DIFFERENT STATES; between citizens of the same State claiming lands under grants of different States, and between a State, or the CITIZEN thereof, and FOREIGN States, citizens or SUBJECTS."

This distribution of original jurisdiction in the above mentioned cases and controversies is determined by the second paragraph of the section, by which the original jurisdiction of the Supreme Court is made to em-

brace and is confined to all cases affecting ambassadors, "other public ministers and consuls, and those in which "a State shall be a party."

In all other cases, its jurisdiction is appellate; thus leaving it to the discretion of Congress to *determine the jurisdiction of the several inferior courts* required, or, at least, authorized, by the Constitution, to be established.

By the Act of the 24th September, 1789, Congress established inferior courts, and extended to them jurisdiction over a large class of the cases and controversies embraced in Article three of the Constitution. As, however, regards "controversies between citizens of different States," and "between citizens of a State and citizens or subjects of a foreign State," the jurisdiction authorized by the Constitution was not fully bestowed on these inferior courts until the passage of the Act of March 3, 1875.

While the jurisdiction, authorized by the *Constitution*, embraced "controversies between citizens of different States" and "citizens of a State and citizens or subjects of a foreign State," thus not restricting the jurisdiction to controversies between citizens of any particular State, provided they were citizens of *different* States, nor to any particular class of controversies, provided it embraces a suit of a civil nature; yet the Act of 1789 restricted the jurisdiction to "suits of a civil nature *at common law or in equity* when the matter in dispute ex-

ceeds, exclusive of costs, five hundred dollars, and the suit was between a citizen of the State *in which it was* brought and citizen or citizens of *other* States."

It was insufficient that, in the language of the Constitution, the parties, plaintiff and defendant, should be citizens of different States, or that the controversy between the parties should be of a nature to be embraced within the definition of a suit. It was essential to this jurisdiction that one of the parties should be a citizen of the State in which the suit was brought, and the controversy of a nature to be embraced within that class which, either by the Courts of England, or of the State in which the suit was pending, might be considered as "a suit at law or in equity."

Such, likewise, was the restrictive character of the provision of that statute authorizing the removal, from a State to the Circuit Court, of suits between citizens of different States, or between such citizen and citizens, or subjects of a foreign State.

While, doubtless, it be true, that so far as the *nature* of the suit was involved, there were but few suits of a civil nature which would not fall within the intendment of a suit "at law or in equity," especially when the gradual increase of equity jurisdiction is considered; yet that the Statute of 1789 did not, in this regard, meet the intent and object of the framers of the Constitution, is evident from the subsequent statutes. It is noticeable,

however, that, previous to the Statute of March 3, 1875, this increase of jurisdiction was affected by laws providing for the removal of suits from the State to the Federal Courts. Such were the Statutes of March 3, 1866; May 11, 1866; July 27, 1866; and March 2, 1867.

The main, if not the controlling, motive of this legislation, as doubtless of the Statute of March 3, 1875, is that stated by the Supreme Court, in the case Gaines vs. Fuentes, 2 Otto, 10.

The Statute of March 2, 1867, extended this right of removal—before restricted, to a citizen of another State when *defendant*, in a suit *at law or in equity*; and applying for removal on his *first appearance*, to such citizen, whether *plaintiff* or defendant, in a suit in which was involved a *controversy*, and on application for removal "*at any time before final* hearing," on only the further condition of making affidavit to the existence of one of the causes for the original adoption of the article; that is, that "he had reason to believe or did believe that, "from prejudice or local influence, he would not be "able to obtain justice in the State Court."

The judicial interpretation given to this statute shows that it materially increased the jurisdiction of the Circuit Court over suits "between citizens of different States."

Thus, it has been held that it conferred on the Cir-

cuit Court jurisdiction over cases thus removed, though thereby increasing its original jurisdiction; that it was a direct prohibition—if any further than the general supremacy appertaining to the Constitution and laws of the United States were required—on every assumed power of a State, through the establishment of Courts of special or limited jurisdiction, to which should be granted a special class of cases, exclusive jurisdiction, from restricting the jurisdiction of the Circuit Court, and removed, what, at times, had been an embarrassing enquiry, whether the suit could be considered as strictly one "at law or in equity," by judicially declaring that "*a controversy is involved in the sense of the statute*, "whenever *any property or claim* of the parties capable "of pecuniary estimation, is the subject of the litiga- "tion and is presented by the pleadings for judicial de- "termination."

There yet remained a jurisdiction, authorized by the Constitution, not enforced by this statute of 1867. It still left the original jurisdiction of the Circuit Court restrictied. It was also questioned, whether in cases removed, the Circuit Court had jurisdiction unless the case removed were one which the Court would have had original jurisdiction. As the act authorizing the removal provides that, after removal, the suit shall proceed in the same manner as if it had been brought there by original process, it was considered that this

clearly implied the action removed should be such a one as could have been brought in the Federal Court by original process; that is, a case strictly within the intendment of a suit at law or in equity.

Nor was a removal authorized when neither party was a citizen of the State in which the suit was brought, nor by a party who was a citizen of such State. It may be that in this regard, at the time, there existed no necessity for legislation; and it was undoubtedly "*State* attachment and *State* prejudice" which the framers of the Constitution mainly feared, and that citizens had no reason to fear the local prejudice or influence within their own States, or in other States where the other parties to the suit were not citizens thereof. It may be the framers of the Constitution builded better than they knew, when their language —controversies between citizens of different States— guarded against not only State attachment and State prejudice, but Sectional attachment and Sectional prejudice, and which prejudice might find its way in Courts of a State against even her own citizens.

Such had been the extent of the legislation of Congress in carrying out and enforcing the provisions of the Constitution granting to the inferior Courts, to be established under it, original jurisdiction over controversies between citizens of dfferent States and subjects of foreign States, when Congress considered it necessary

to pass the Act of March 3, 1875, by which the jurisdiction of the Circuit Courts, concurrently with the State Courts, was extended, in the very words of the Constitution, "to controversies between citizens of different States, and between a State or the citizen thereof and a foreign State, citizen or subject," provided only that the matter in dispute exceeded, exclusive of costs, five hundred dollars.

This Act likewise extended, by its third section, the right of removal of like causes when instituted in *any* State Court, on the simple petition of either of the parties made at any time before or at the term at which said cause could be first tried and before the trial thereof.

And to secure the enforcement of such right of removal, it is provided by the 7th section of the Act:

"That if the Clerk of the State Court in which any "such case shall be pending, shall refuse to any one or "more of the parties or persons applying to remove "the same, a copy of the record therein, after tender "of legal fees for such copy, said Clerk, so offending, "shall be deemed guilty of a misdemeanor, and on "conviction in the Circuit Court of the United States, "to which said action or proceeding was removed, "shall be punished by imprisonment not more than "one year or by fine not exceeding $1000, or both, in "the discretion of the Court."

By this resume of the action of Congress, it appears that only as, in its opinion, it became necessary to se-

cure the constitutional right of citizen or alien, was the jurisdiction of the Federal Courts gradually extended, and that, at last, it was considered expedient to vest Circuit Courts with jurisdiction over such controversies, *to the full extent* granted by the Constitution; and, by stringent legislation, to guard against any possible interference with this jurisdiction by State Courts.

In applying the ordinary rules of interpretation, guided by the letter and the recognized causes which led to the adoption of this article of the Constitution, it must be considered undoubted, that whenever there arises a controversy, in a suit between parties standing towards each other in the relation mentioned in the Article, the Circuit Court, of the proper District, has jurisdiction of such suit. To this purport the text is clear and distinct. Besides the condition that the suit *involves a controversy* and is between *citizens of different States*, or between a citizen of a State and a citizen or *subject of a Foreign State*, none other is to be found. To this there is no exception found in the Constitution or Statute, nor, from its language, is any to be implied. Hence, as declared by Mr. Chief Justice Marshall, when interpreting the language of this article in its application to a suit wherein a State is party: "If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless its inference be unmistakable." And as this interpre-

tation is the evident intendment of the language of the Constitution and Statute—for as before stated, this in both is identical—it not only finds support in the reason inducing the Convention in its adoption in the Constitution, and Congress in the adoption of the Statute, but also the reason and the object sought preclude the probability of any such exception having been intended.

Clearly then, it is not the *nature* or *character* of the controversy on which the existence of an exception can be based; for the character of the controversy does not enter into the reasons for the granting of the power. In the language of Mr. Chief Justice Marshall, the article herein refers to description "of cases where-"in the jurisdiction of the Court is founded entirely "on the character of the parties, and the nature of the "controversy is not contemplated by the Constitution. "The character of the parties *is everything*, the nature "of the case *is nothing*."

The reasons for the provisions apply necessarily to one kind of controversies as to another. Confidence of foreign States in the impartial administration of justice to their citizens or subjects; protection against the danger of local prejudices are as important in one class of cases as in another; in an action for recission of a contract or muniment of title as the enforcement of the payment of a foreign bill of exchange; for the

recission of a testament on the ground of incapacity of testator, or of undue influence over him in the execution of it, as the recission of a contract of sale by a principal to an agent, for like causes.

No warrant exists, nor, in the nature of things, can exist, for claiming any exception against the right of parties possessing the character given in the article, to have their legal controversies adjudged in the Circuit Courts. Nor, so long as the supremacy of the Constitution of the United States and the laws made in pursuance thereof, are recognized by the Courts established under them, will this right be denied to such citizens and subjects. To deny this, on any ground, would be the "perfect solecism" referred to by Story, for, to such extent as such controversy between such citizens and subjects were refused or denied jurisdiction in the Federal Courts, to such extent would the Constitution and laws of the United States not be supreme.

Nor, without violation of the Constitution, or defiance of its supremacy, can a State, either by legislation or through organization of its judiciary, debar the Federal Courts of the jurisdiction thus granted. For, were such powers, to any extent to be recognized, to that extent the laws of the State, and not those of the United States, would be supreme.

Hence, there is no warrant for the doctrine, by some defended, that cases, though involving controversies

between citizens of different States and otherwise falling within the jurisdiction of the Circuit Court, can be withheld from such jurisdiction by the establishing of State Courts to which special jurisdiction of those cases be given. Were it so, then the jurisdiction of the Circuit Court over controversies between citizens of different States, would be that not exclusively bestowed by the Constitution and laws of the United States, but also *permitted* by the laws of a State, and dependent upon whether the controversy were subject to *its* Courts of general or limited jurisdiction.

The dangerous consequences of such doctrine was forcibly stated by Mr. Justice Story, at Circuit, in *ex parte* C. C. Biddle and others, 2 Mason, 472. This was an action instituted in the Circuit Court, for a partition on a motion to dismiss the suit for want of jurisdiction on the ground that this was a *statute remedy*, limited by the terms of the statute to the State Courts. The Court says :

"The motion to dismiss this proceeding, is founded upon the notion, that a petition for partition is a statute remedy, which is *confined by the terms of the statutes* to the State Courts, and the argument is, *that if so*, it can not be pursued in *any other* Courts. It is certain, that the statutes confine this remedy in terms to the State Courts; and so they do all other remedies, for no State Legislature can be presumed to legislate, as to remedies, except in its own Courts. If the argument be well founded in this case, it will have a most material bear-

ing upon the jurisdiction of the Courts of the United States, and shut out parties, who are entitled to sue, from almost all the most useful remedies which the *lex loci* has provided for the protection of their rights. I have bestowed a good deal of reflection upon this subject, and am satisfied, that parties entitled to sue in the Courts of the United States are in general entitled to pursue in such Courts all the remedies for the vindication of their rights, which the local law of the State authorizes to be pursued in its own Courts. * * The whole structure of our judicial establishment manifestly contemplates, that in cases within the reach of their jurisdiction, the Courts of the United States are to administer the same remedial justice that would be administered in the proper State Courts."

In the case of Chicago & N. W. R. R. Co., Whiton, Adm., 13 Wallace, the legislature of Wisconsin had created a new cause of action which provided that such action should be brought in some Court established by the Constitution and laws of the State. The plaintiff, under the Statute of March 2, 1867, applied for removal of the cause. The lower Court granted the order, with a stay of proceedings until the question could be decided by the Supreme Court of the State. That Court denied the right of removal. On appeal, the Supreme Court of the United States reversed that ruling, holding that, under the Statute of 1867, there was no exception to the right of removal as claimed in the State Court.

In like manner the Supreme Court in Gaines vs.

Fuentes, (2 Otto, 10), said: "It matters not whether the suit was brought in a State Court *of limited or general* jurisdiction. The *only* test was *did it involve a controversy* between the citizens of the State and citizens of other States."

And when the 11th Section of the Judiciary Act of 1789, which declares that "no United States District "and Circuit Courts shall have cognizance of any civil "suit to recover the contents of any note or other, "chose in action in favor of an assignee, unless suit "might have been prosecuted in such court to recover "said contents, if no assignment had been made," was plead against the right of removal of a cause from a State Court under the Act of 1867, Mr. Justice Bradly, at Circuit, considered that even this Federal statute, in a case admitted to be undoubtedly within its purview, *yet not founded under any constitutional principle*, had to yield to one so founded, and therefore, held "that as the Act of 1867 is general in its terms, and gives the right of removal *in all cases without exception when the parties are citizens of different States*, I do not think it necessary to import into it an exception grounded on the 11th Section of the Judiciary Act." Barclay vs. Levee Com's, 1 Wood, 256.

But the principles enunciated by these decissions are only in consonance with that constitutional argument made on behalf of the Supreme Court by its Chief

Justice. "It is manifest," says Mr. Chief Justiec Marshall, in Vaugh vs. Virginia, 6 Wheat., "that the Constitution has proceeded upon a theory of its own, and given and withheld powers according to the judgment of the American people by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that State interest might sometimes obstruct or control, or be supposed to obstruct or control the regular administration of justice. Hence, in controversies between States; between citizens of different States; between citizens claiming grants under different States; between a State and its citizens or foreigners; and between citizens and foreigners, it enables the parties *under* the authority of Congress, to have the controversies *heard, tried* and *determined* before the national tribunals. No other reason than that which has been stated can be assigned *why some, at least*, of these cases *should not have been* left to the cognizance of the State Courts."

If, therefore, the Constitution and the statute under it, of March 3d, 1875, are clear in their object and language, and no exception and cause for objection be found in the Constitution or law, and a State has no power or right to make one, why should not this Court exercise jurisdiction in the case at bar?

Is it because there are not proper parties? Two of the plaintiffs are citizens of different States from that of defendant, and two are subjects of a foreign State.

Is it because the suit does not involve a controversy within the purview of the Constitution? Complainants, by their bill, claim to be the next of kin and collateral heirs of their sister, and present for the judicial determination of the court, their claim and demand against the defendant for an account of his agency in the possession and management of her property and affairs under notarial act of procuration from the 10th May, 1878, to her death on the 4th July, 1879; for the surrender of all such property, rights, credits, books, title, deeds, etc., which, through such agency, came into his possession; as also an account as trustee of his management of said property, its fruits and revenues since her death; all of which, notwithstanding due amicable demand, said defendant has refused to do.

The charging part of the bill—which under the rules of this Court might, strictly, have been omitted, sets forth that said defendant, in order to deprive complainants of the right to thus demand such account and return of said property, pretends and gives out that his said principal, by a certain instrument in writing, executed at Harrison County, Mississippi, on the 4th January, 1878, her certain olographic will and testament, by which she bequeathed to him all her

property, real, personal and mixed, wherever located and situated, wholly and entirely without hindrance or qualification for his own sole use and benefit and constituted him her sole heir, executor and administrator. To this pretence the bill, though admitting the execution of such writing, alleges its nullity for the grounds of substance in the bill set forth.

The bill further charges that defendant though well aware of the nullity of said alleged instrument, presented the same on the 15th July, 1879, to the Judge of the Second District Court for the Parish of Orleans, sought and obtained an *ex parte* order for its probate and registry, and thereupon immediately obtained from said judge an order putting him in possession of all the property, real, personal and mixed, left by Mrs. Dorsey, and wherever situated.

That said order of probate and order of possession were, in the premises, unadvisedly rendered;

Defendant, with fraud in the matter of said will and orders of probate and possession;

That defendant pretends to have another muniment of title to a portion of his principal's said estate, to-wit: that known as "Beauvoir," situate in Harrison County, Mississippi, through a certain deed executed by her to him on the 18th Feb'y, 1879. To this pretence the bill alleges that said deed is null and void, for like causes plead against the validity of said testament, and for

the further reason of the existence of said agency and the procurement of said deed through undue influence:

That, notwithstanding this, defendant claims the full benefit of said alleged testament, orders of probate and possession, and deed, as muniments of title to all and singular the estate of his said principal, and threatens, in case complainants should, in the premises, proceed at law, or in equity, against him. to plead the same in bar thereto.

On the foregoing causes of actions, complainants pray that said alleged testament and deed be declared null; said orders of probate and possession revoked as unadvisedly rendered in so far as either said will, order of probate and possession, and said deed in any manner to be plead by defendant as recognizing him as testamentary heir, or as a muniment of title or legal bar against the demand of complainants; that defendant be required to surrender to them said property, and render an account of his said agency; and for such further order and decree as shall be agreeable to equity and good conscience.

It is most respectfully submitted that the case at bar does involve a controversy in the fullest sense of the third Article of the Constitution and the Statute of March 3, 1875; for a demand for an account and surrender of assets by an agent, or for the nullity of a testament for causes of mental incapacity, undue influence or

illegality, have been too common and too long recognized subjects of litigation not to be so considered, either according to the interpretation given in Gaines vs. Fuentes or by any other recognized authority.

And as to the *ex parte* proof of the testament and order of probate, though also sufficient to form the subject of a legal controversy, as ruled in the said case of Fuentes, there is no real issued regarding the form or genuineness of the instrument presented for probate, that it was entirely written, dated and signed by the alleged testatrix, and in the form required for an olographic will, and hence, any question regarding the order of probate, whether it were *res adjudicata* or only *ex parte*, subject to attack, or that such issue would or would not fall within the jurisdiction of this Court, cannot effect the question of jurisdiction over the demand for an account, or the nullity of the testament for vices of substance : This, no more than the genuineness and correctness in form, of a notarial agreement, a sale, exchange or lease, could effect the question of jurisdiction of an action to annul such contract on the ground of incapacity of one of the parties, fraud, error or lesion.

True, an imperfect probate would debar defendant from pleading the testament as a muniment of title, but a legal probate does not, in any manner, debar the legal heir from attacking the validity of the testament itself.

And, further, it is submitted, that, whether the relative relation of the parties, on the one hand, or the gravamen of the controversy on the other, be considered, no suit could illustrate the worthiness of the motive and object, or prove the wise foresight of the framers of the Constitution in determining the jurisdiction to be entrusted, under the direction of Congress, to the Federal Judiciary, more forcibly than does the case at bar; and wherein jurisdiction should de denied only upon reasons indeed clear and conclusive, upon authority and precedent strictly applicable.

The ground, and only one stated in the demurrer against such jurisdiction, is:

"That it appears by said complainants' own showing by their said bill, that the cause of action in said bill set forth, if any accrued to said complainants, is within the exclusive jurisdiction of the Honorable, the Second District Court for the Parish of Orleans, and not within the jurisdiction of this Court, and this Court ought not to take cognizance thereof."

After the examination already made as regards the source, extent, and, within its sphere, independence and supremacy of the jurisdiction of this Court, and reference to the recitals of the bill, clearly showing a controversy between parties alone esssential to such jurisdiction, it is difficult to say which feature of this demurrer is the most striking; the nonchalant manner in which, on behalf of this defendant, the Federal is

made to yield to the State Judiciary, or the generous manner in which the issue of jurisdiction is made to rest on a statement of facts entirely of complainants' own making.

This, indeed, may be the cause why complainants' counsel did not, at the first hearing, give that consideration to this ground of demurrer which a seriously advanced issue, in regard to jurisdiction, merits; and such error must be his excuse, should one be required, for, perhaps the now too extended discussion.

As the facts on which this issue of jurisdiction is to be determined, are those found stated in this bill, the law and authority stated in the oral and written arguments of defendant's solicitors are understood, substantially to be:

Article 73, of the Constitution of Louisiana of 1868, providing that the judicial power is vested in a Supreme Court, (strictly limited to a Court of Appeals,) District Courts, and, in all parishes other than Orleans, Parish Courts, and Justices of the Peace; and

Article 78, which provides: "Until otherwise pro-
" vided, there shall be one District Court, except in the
" parish of Orleans, in which the General Assembly
" may establish as many *District* Courts as the public
" interest may require. Until otherwise provided there
" shall be seven *District* Courts, with the following
" jurisdiction: First, exclusive criminal jurisdiction;
" Second, exclusive *probate jurisdiction;* Third, exclu-
" sive jurisdiction of all appeals from Justices of the

" Peace; Fourth, Fifth, Sixth, and Seventh, exclusive " jurisdiction in all civil cases *except probate*, when the " sum in contest is above one hundred dollars, exclu- " sive of costs."

The subsequent act of the Legislature, by which the District Courts of this parish were re-organized, each retaining exclusive and restricted jurisdiction, enacted that " the Second District Court shall " be " *strictly a probate Court*, and shall have exclusive " jurisdiction over probate and succession cases, and all " appointments that may be necessary in the course of " the administration of estates, all matters relating to " minors, persons interdicted and absentees, or in which " they are interested, shall be made and carried on in " said court."

As each of these District Courts have *exclusive* jurisdiction, embracing in the aggregate, the whole jurisdiction granted by the Constitution, it follows, that the jurisdiction of each is *limited* and *restricted* to that specially granted.

These articles of the Constitution and subsequent statute, it is contended, under the decisions of the case of the Broderick's will, decided at the October term 1874, of the Supreme Court, and reported in 21 Wallace, 503, deprives this Court of jurisdiction of the present controversy, because, by the State Constitution and Statutes of Louisiana, jurisdiction thereof is exclusively vested in the said Second District Court.

It ought, it is respectfully submitted, to be a sufficient answer to this argument, to say that *if the Constitution and laws of Louisiana intended* to render the jurisdiction granted to the Second District exclusive, beyond the *other District Courts* of the parish, and render it exclusive of the Circuit Court, such provision would be in direct violation of the Constitution and laws of the United States, which grant to the Circuit Courts a concurrent jurisdiction over controversies between citizens of the different States. And *if the decision* in the case of Broderick's will *recognized any such* exclusiveness in a State Court of California, it must have been because of the limited character of the jurisdiction of the Circuit Court under the judiciary Act of 1789, and hence would not form a precedent determining its jurisdiction under the Statute of March 3, 1875.

An inquiry, therefore, ought not to be required of counsel, as to what really was the jurisdiction given by law to the County Court of San Francisco? What the facts in the Broderick will case? What was really adjudged in that case? What the jurisdiction really given by the laws of Louisiana to the Second District Court? For whatever such discussion might determine, it could not lessen nor detract from a jurisdiction granted by the fair intendment of the Statute of 1875. Yet the exigency of the case * * jurisdiction having

been denied, under an interpretation given to the case of Broderick's will—requires of counsel such inquiry.

The natural order of inquiry would be to examine first what was the jurisdiction of the County Court of San Francisco, and to what extent that of the Second District Court, for the parish of Orleans' is similar.

The sixth Article of the Constitution of California of 1849, provided:

"Sec. 1. The judicial power of the State shall be vested in a Supreme Court, in District Courts, in County Courts and in Justices of the Peace.

Sec. 4. The Supreme Court shall have appellate jurisdiction in all cases where the matters in dispute exceed two hundred dollars.

Sec. 6. The District Court shall have original jurisdiction, *in law and equity*, in all civil cases where the amount in dispute exceeds two huudred dollars, exclusive of interest. In all criminal cases not otherwise provided for, and in all issues of fact joined in the Probate Courts, their jurisdiction shall be unlimited.

(In Reed *vs.* McCormick, 4 Cal. 342, it was held that the word "unlimited" qualified the amount in value and the term "original" and that "issues of fact," etc., refer to issues to be tried).

Sec. 8. There shall be elected in each of the organized counties of this State, one County Judge, who shall hold his office for four years. He shall hold the County Court, *and perform the duties of Surrogate or Probate Judge.*

Sec. 9. The County Courts shall have such jurisdiction, as the Legislature may prescribe, but shall have

no original civil jurisdiction, except in such special cases."

The powers granted to and duties imposed on the County Judge, acting surrogate by the above provisions of the Constitution and the Statute passed in regard thereto, are succinctly stated in the following abstract by Mr. Justice Bradley in the "case of Broderick's will."

"The act of the legislature in force at that time, on the subject of probate, was the act of May 1st, 1851, entitled 'An act to regulate the settlement of the estates of deceased persons.' By this act, as it stood in 1860, having been somewhat modified by sundry amendments, it was declared that the County Courts, when sitting for the transaction of probate business, should be known and called the 'Probate Court,' and the County Judge should be *ex officio* Probate Judge. The mode of procedure for the probate of wills was pointed out. A petition was to be filed in the proper Court by the executor or other person interested, and a day appointed for proving a will, not less than ten nor more than thirty days distant, and notice was to be published not less than twice a week in a newspaper published in the county, if there was one; if not, then by posting in three public places in the county. Citations were also to be issued to the heirs, if they resided in the county, and to any executors named in the will and not joining in the application for probate. Subpœnas were to be issued to the witnesses if they resided in the county. Any person interested might appear and *contest the will;* and if it should appear that there were minors or non-residents of the county interested, the Court was to appoint an attorney to represent them. If any person should appear and contest the will he

must file a statement in writing of the grounds of his opposition. Issues when formed were to be sent to the District Court for trial by jury, unless the parties consented to a trial in the Probate Court *Incompetency, restraint, undue influence, fraudulent representations, and any other cause* affecting the validity of the will, are specially mentioned as questions upon which issues might thus be formed. Various provisions were added calculated to *secure a thorough investigation on the merits.*

"It was further provided, that when a will had been admitted to probate, any person interested might at any time within one year after such probate, contest the same *or the validity of the will*, by filing in the same Court a petition containing his allegations against *its validity*, or the sufficiency of the proof, and praying that the probate might be revoked. Hereupon new citations were to be issued and a new trial had. But it was declared that if no person should within one year appear to contest the will or probate, the latter should be conclusive, saving to infants, married women and persons of unsound mind, a like period of one year after disability removed."

The text of Sec. 20, determining the form of contest is:

"If any person appears and contests a will, he shall file a statement in writing of the grounds of his opposition; when any issue or issues of fact shall be joined in the Probate Court, respecting the competency of the deceased to make a last will and testament, or respecting the execution by the deceased, of such last will and testament, under restraint or undue influence, or fraudulent representations, or for any other cause affecting the validity of such will, such issue or issues shall, at the request of either of the parties interested, be cer-

tified immediately to the District Court of the proper county for trial by jury; or may, by consent of the parties, be tried by the Probate Court. Issue shall be deemed joined by the filing of the grounds of opposition as aforesaid, with the clerk of the Probate Court; such issue or issues of fact shall be made up and tried in the same manner, as is or may be provided by law for the trials of issues of fact in other cases; upon determination of such issue or issues of fact, the jury trying the same shall render a special verdict thereon, and the finding of the jury shall be certified by the District Court to the Probate Court, whereupon the Probate Court shall proceed to admit said will to probate or not, according to the facts found and the law."

And in conclusion the statute provides:

"SEC. 36. If no person shall within one year after the *probate*, contest the *same*, or the *validity* of the will, the probate of the will *shall be conclusive*, saving to infants, married women, and persons of unsound mind, a like period of one year after their respective disabilities are removed."

After a review of the law of California, the learned Justice, and with reason said: "In view of these provi-" sions, it is difficult to conceive of a more complete and " effective probate jurisdiction."

It had also been adjudged by the Supreme Court of California, previous to the institution of the suit of Broderick's heirs, in a suit by the State against the Executors, seeking, through a bill in equity, to restrain the sale of the property of Broderick's estate, on similar grounds of fraud as alleged by the heirs, that in as much

as by statute, the matter of *the probate* of the will belonged to the exclusive jurisdiction of the Probate Court, *and having been decided by that Court*, its decree of probate was *res adjudicata*, and could not be reversed by the Court of Chancery. See California vs. McGlyon, 20 Cal. 233–266.

Thus it is seen:

That at the time of the probate of the will of Broderick, the District Courts of California were vested with and restricted to an *exclusive* original jurisdiction in all civil cases, at law and *in equity*:

That jurisdiction in all matters of the *probate of wills and cases involving their validity*, including all issues as to the soundness of mind of the testator, the procurement of the testament through undue influences, fraud, or illegality of its bequests, *was excluded* from the jurisdiction of the *District* Courts:

That the County Courts in which exclusive jurisdiction of proof of execution and validity of wills was vested, was *not* a Court of law or equity *in the sense* of the Constitution of California or the section of the judiciary act of 1789.

Hence, as the Circuit Court for the District of California, either through the jurisdiction belonging to the Courts of Chancery of England, or the Equity Courts of California, had no jurisdiction over matter of pro-

bate, it refused to entertain jurisdiction in the case presented by the heirs of Broderick.

This, and in this regard only this, is what was intended to be adjudged in that case.

This is made clear not only by what is said in the closing part of the opinion, but in the subsequent case of Gaines vs. Fuentes. When the counsel of the heirs of Broderick pleads, as a ground *for* jurisdiction of the Circuit Court, the State Statute of 1862, which invested the *District* Courts with jurisdiction "to set aside a *will* obtained by fraud, or undue influence, or a forged will, and any *probate* obtained by fraud, concealment or perjury," the Court, referring to the effect of this Statute, said:

"Whilst it is true that the alterations in the jurisdiction of the State Courts cannot effect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of the equitable rights may be administered by the Circuit Court, as well as by the Courts of the State. *And this is probably* a case in which an enlargement of the equitable rights *is effected*, although presented in the form of a remedial proceeding. Indeed much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties." "But," adds Mr. Justice Bradley, as organ of the majority of the Court, "the Statute referred to cannot affect *this* suit, *in as much* as the Statute of limitations would *still apply* and would present a perfect bar to the suit."

Justices Clifford and Davis did not consider that the complainants had been guilty of such laches as should render them liable to the statutes of limitation, and considered that there was no ground for the plea to the jurisdiction.

Referring to this case, the Supreme Court, in Gaines *vs.* Fuentes *et als*, says:

"In the case of Broderick's will, the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of Courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate, and whatever the cause of the establishment of this doctrine originally was, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills, vested in the Probate Courts and the revisory power over their adjudication in the appellate Courts. But that *such jurisdiction may be vested* in the State Courts of equity by statute *is there recognized*, and that when so vested the *Federal Courts*, sitting in the States where such statutes exist, *will also entertain concurrent jurisdiction in a case between proper parties.*"

That such was the intent of this decision is also stated by Mr. Justice Bradley in his dissenting opinion in same case.

Hence, in order for the Broderick case to be authority against the jurisdiction of this Court in the case at bar, it must be shown that the State Court, having jurisdiction over it, is prohibited the exercise of equity powers.

Fortunately the character of the jurisdiction of the Courts of Louisiana, and its bearing upon the equity jurisdiction of this Court, has been so frequently subject of adjudication as should cause no doubt or perplexity in regard thereto.

The Courts of Louisiana are, by the Constitution, vested with entire original jurisdiction, in civil cases, irrespective whether such cases are or are not, cases at law or in equity. They constantly exercise jurisdiction, and through forms of proceeding, appertaining, in other States and England, to Courts of Chancery. They issue the most gracious writ of injunction; enforce all privileges and mortgages; secure discovery through sworn answers of parties; in civil actions their judges adjudge the facts as well as law; trial by jury is the exception—by the Court the rule. Review of judgments by the Supreme Court are by appeal, not by writs of error.

From a full collation of decisions, Mr. Hennen, in his admirable Digest, states, in regard to the equitable jurisdiction of the Courts of Louisiana:

"In the jurisprudence of this State, no distinction "is made between legal rights and equitable rights, "between legal injuries and equitable injuries; and in "the administration of remedial justice, except so far "as relates to the Federal Courts sitting within the "State, the modes of proceeding and granting relief

" under the two systems are blended in one, and our
" courts *are at once courts of equity and courts of law.*
" Thus they will grant injunctions to prevent waste
" and irreparable injury; to prohibit the unauthorized
" publication of private letters; to suppress public or
" private nuisance; to restrain the undue exercise of a
" right against conscience and equity; and in general,
" to prevent any act, which, if consummated, would
" afford ground for a claim for damages. They allow
" a resort to the conscience of a party. They will
" compel the surrender of securities improperly retained.
" They will prevent a party from setting up a claim or
" title that would be against conscience, and will bind
" him by an equitable estoppel. They have authority
" to appoint auditors and experts, and to grant a full
" relief in matters of complicated accounts; compel
" the production of books, etc. In the *relations of*
" *principal and agent*, they will generally regard the
" latter, not as debtor, but as a trustee of the former,
" and treating the mandate as a trust, they will not
" permit the trustee to take any profit to himself from
" theconcerns of his trust, but will compel him to
" hold on to any advantage he may have acquired from
" the principal, and to carry out the object of the
" mandate which he has undertaken; and in the set-
" tlement of their accounts, relief will be given from
" error, fraud or omission.

" They will enforce the payment of legacies; effect " the partition of estates held in common. * * " They will decree an account of assets, and a due set- " tlement of the estates of persons deceased or bank- " rupt, and the creditors in their race of diligence, and " force them into the court, when the settlement of the " estate is to be made, to litigate their claims together; " * * *and in all matters relating to the admin- " istration of such estates they proceed according to the " principle of equity.* * They, in all cases, " compel him who seeks equity, to do equity; and in " general, they will extend to parties litigant, in the " redress of their wrongs and in the vindication of " their rights, remedies, plain ,adequate and complete." Hennen's Digest, *verbo* Equity, pp. 474, 5."

This has always been recognized by the Federal Courts, by determining their jurisdiction within the District of Louisiana. It was the subject of inquiry several times in the early stages of the Gaines litigation. The question arose as early as 1839, in the then District Court, having circuit jurisdiction, in regard as whether in equity cases the *State practice* should be retained. 13 Peters, 414; again in 1841, 15 Peters 9. In 1844, the question was before the Court in the same case on the certificate of the judges to the question of jurisdiction, wherein Mr. Justice McLean, as organ of the Court, said:

" Under the peculiar system of that State, the forms " of procedure being conformable to the civil law, are " the same in all cases. But the Circuit Court of the " United States, exercising jurisdiction in Louisiana, " as in every other State preserves distinct the com- " mon law and chancery powers. In either the State " or Federal Court the relief is the same; the differ- " ence consists only in the mode of giving it. * * " Believing that the *mode of proceeding* then in the " State Courts *was adequate to all the purposes of justice;* " and knowing with what pertenacity even forms are " adhered to, I was averse to any change of the prac- " tice in the Federal Courts. But I was over-ruled; " and I see in the change only a change of mode, " which produces uniformity in the Federal Courts " throughout the Union. No right is jeoparded by " this and to say the least, wrongs are as well redressed " and rights as well protected by the forms of Chan- " cery, as by the forms of the civil law."

The same recognition is found in Gaines vs. Fuentes.

Therefore, the County Court of San Francisco, differs from the Second District Court, for the Parish of Orleans, in its lack of equity jurisdiction.

There exists also a great difference in the extent of probate powers. The proceedings in the County Court of San Francisco, as has been shown, embrace all the essentials of a judicial controversy, including the citation of heirs, notice to all parties in interest of not less than ten days, to appear and contest the probate, not only as regards its *execution* and legal *formalities*, but likewise the validity of the testament as regards the

soundness of mind of the testator, undue influence over him in its execution, all questions of fraud or illegality, and all other matters of substance.

Its decree of probate vested on issues made, evidence adduced, as in ordinary cases, and though partaking of the character of an action *in rem*, its decree had the force of the thing adjudged, was *res adjudicata*. Moreover to the same court was specially given jurisdiction over the action of nullity of such decree, and such actions subjected to the prescription of one year.

The jurisdiction of the Second *District* Court for the Parish of Orleans, as of the Parish Courts of this State in matters of probate, involves no such issues, embraces no such proceedings, and consequently acquires no such judicial force.

The law, declaring the extent of such jurisdiction and the forms and rules of procedure, is subject of special and clear provisions. They are embraced in Article 922 et seq. of the Code of Practice and Article 1644-1657 of the Civil Code, re-adopted since the constitution of 1868, and which substantially are:

C. P. Art. 922. They are called Courts of Probate because *the proving and recording* of last wills and testaments are made before them.

Art. 924. Courts of Probate have the *exclusive* power *to open and receive the proof* of last wills and testaments.

There are thirteen other enumerations in this article

providing substantially, that such probate court shall have power to appoint and remove administrators, curators of vacant successions; issue letters of executorship; grant orders of inventory and sale; order rendition of accounts by tutors, administrators and executors; order heirs to determine as to acceptance or rejection of succession; determine order of privileges; order and regulate partitions of successions.

And, by Art. 925, it is specially provided:

"The Courts of Probate shall have no further jurisdiction except in the cases enumerated in the preceding article, or those which shall be mentioned in the remaining part of this title and in those specified and determined by law."

The provisions of the remaining portion of the title refer exclusively to the rules of proceeding in the enforcement of the powers granted by the article.

The other provisions of law are those of the Civil Code regarding the settlement of successions; and Section 5, Articles 1644–1657, "of the opening and proof of testaments."

The powers of the Second District Court, as stated in the act establishing it, are: 1st, to the probate of testaments, and 2d, settlement of such successions, the *judicial* settlement of which may be required.

Regarding the proceedings in probate, it is provided by the Articles of the Civil Code, 1644–1657, and Code of Practice, Art. 924 *et seq*:

"That no testament can have effect unless it has "been presented to the Judge of the Parish in which "the succession is opened." It is the duty of the testamentary executor, and the right of any one who has an interest in having the testament executed, to present it with a petition to the Judge asking its probate. Whereupon the Judge, after first being satisfied of the death of the testator, shall order the testament to be proved before him on a day, hour and place to be fixed by him, by the number of witnesses required for that purpose by law. It is made the duty of the party praying for the proof of the testament to cause those witnesses to be summoned, and to give, in writing, notice to the presumptive heirs, if they reside in the place (parish), that they may, if they think proper, be present at the opening and proof of the testament. Provision is made as to the number of witnesses required for the proof of nuncupative testaments by private act, mystic and olographic testaments,' nuncupative testaments by public (notarial) act, do not require proof. The proof of an olographic testament is that it be acknowledged and proved by the declaration of two credible persons, who must attest that they recognize the testament as being entirely written, dated and signed in the testator's hand-writing, as having often seen him write and sign during his life-time. After such proof, it is the duty of the judge to order the *regis-*

try and execution of the testament, and thereupon prepare a proces verbal in which he shall recite :

1. The manner in which the opening and proof were made.
2. The names and surnames of the witnesses and the manner in which they made these declarations.
3. The reading of the testament in an audible and distinct voice to the witnesses and persons present.

This is the extent of a probate under the laws of this State. There are, strictly no parties, no *contestatio litis*. The whole inquiry is confined to the factum of the instrument having been written in the manner and form, and in presence of witnesses, and as required by law. All is done in simple obedience to a statutory provision as to the mode of authentication of a private instrument constituting, when so authenticated, legal proof of a donation *mortis causa*. It is the exclusive mode ordained by law for authentication of testaments.

Such decree of probate does not reach as Mr. Justice Field seemed to think, in Gaines vs. Fuentes, the force of proceedings *in rem*, for while the latter embrace a controversy wherein the whole world are parties, these probate proceedings, in a legal sense, embrace neither parties nor controversy.

In any manner, or for any purpose, to claim for an order or decree, thus obtained, the same judicial consideration as for a decree of probate under the laws of California, would be abhorent to not only the judicial mind but every sense of justice.

When Mr. Chief Justice Merrick, as the organ of the Court in the Succession of Clark, 11 An. 133, said: that "any person who at any time might desire to do so, could contest said will or the probate thereof, either in a direct action or as a means of defence, whenever said will should be set up as a muniment of title," he announced simply a well-recognized principle of law.

Another evident distinction, and which, from the position assumed on behalf of the demurrer, is important in the present inquiry, is that these proceedings *for proof of a testament*, in no manner involve the validity of the instrument in matters of substance. No such inquiry is imposed upon the judge, nor is he authorized to assume it. So well recognized is this rule, that excepting the case at bar, only one other instance is reported, where there was ever such tender of proof embracing in that instance, a tender of proof, by a presumptive heir present at the probate, of the unsoundness of mind of the testator; and in that case, the proof was refused by the judge, who held that such inquiry was foreign to the proceedings, and could be only made in an issue raised by a direct action; which ruling, on appeal, was affirmed. See Succession of Eubanks, 9 An.

Hence, the proceedings had, at the instance of defendant, in the Second District Court, in no manner, as so successfully contended, affects complainant's action,

or the jurisdiction of this Court over it, to annul the testament of Mrs. Dorsey on the ground of unsoundness of mind, undue influence, or illegality.

After these proceedings of probate, the remaining jurisdiction of the Second District Court over the succession of the testator, depends, as in other kinds of successions, upon the condition of its affairs, the provisions of the testament, and action of the heirs; whether the heirs are absent; or, if present, desire time to determine as to their acceptance, or their acceptance under benefit of inventory; the demand of creditors that their credits, privileged on the assets, shall be paid before those assets become mingled with the personal assets of the heirs.

When, however, these creditors do not require it, or the heirs, legal or testamentary, are willing to accept unconditionally, and pay, or secure the special legacies and creditors, the *jurisdiction of the Court does not attach;* no seizin is taken, or, if temporarily taken, is surrendered on the remittting of possession to the heirs.

And the jurisdiction, when exercised, depending upon the seizin of the property, arises more *ratione materiæ* than *ratione personæ*, and is exercised through proceedings *in rem* rather than *in personam*. Hence, by the laws determining the jurisdiction of the Second District Court over or in regard to the succession of Mrs. Dorsey, whatever it may have been when at de-

fendant's instance, it was assumed in said proceedings of probate, such jurisdiction ceased on the rendition of the order putting "him, as the sole and universal "legatee, in possession of all the property, real, personal "and mixed, left by the said late Mistress Sarah Ann "Dorsey, and wherever situated."

Such is not only the plain and evident intendment of the language of the statutes determining the jurisdiction of Courts entrusted with proof of testaments and settlements of successions, but is the interpretation ever given to those statutes by the Courts of Louisiana. Thus, in the late case of Succession of Jennie A. Walker, not yet reported, the Court refused to issue letters of testamentary executorship, on the ground that, as there were no debts or special legacies to be paid, there was no necessity for a judicial administration of the succession; for, says the Court:

"An administrator will not be appointed to an intestate succession when there are no debts, and we are at a loss to discover any one useful object to be obtained by embarrassing this succession with this unnecessary administration."

The cases reported in 4 An. 570, 22 An. 23, 64 and 26 An. 122, are to same import.

Likewise, where the Court *has assumed jurisdiction*, and the affairs of the succession have been settled and *heirs put in possession*, whereby the seizing of the prop-

erty by the Court ends, its jurisdiction is held to have ceased.

In Wisdom vs. Buckner, 31 An. 57 :

"To say, then, that Art. 983, C. P., forbids action *in rem* to be brought in Probate Courts, would strip them of nearly the last vestige of jurisdiction in succession matters."

In Wolfolk vs. Wolfolk, 30 An. 139 :

"The Parish Court was without jurisdiction, *ratione materiæ* in the matter of the partition, for the reason that there was no longer a succession to be settled."

In Freret vs. Freret's Heirs, 31 An. 511 :

"Successions cannot continue long. They are intended to be short-lived. * * Their termination is fixed, at the time when all the debts appearing to be settled by a final account of the representative of his gestion being homologated, the heirs *nemine obstante*, are put in possession by a judgment."

In concurrent opinion in same case, of Mr. Justice Spencer :

"If the heirs were in actual possession, the succession ceased to exist, and any suit thereafter brought for a partition COULD *not be entertained by the Probate Court.*"

See also 30 An. 752, *idem* 1338; 28 An. 447; 22 An. 4; 25 An. 56, 220.

The same construction holds as to annulment of testaments and revocation of probate, and was so recog-

nized by the Supreme Court of the United States, in Gaines vs. Relf, 2 Howard, 647.

The case of O'Donegan vs. Knox, 11 La. 384, was a case of "an heir at law claiming a share of the succession of her deceased sister, who was the wife of the defendant, who holds possession of it under a will as instituted heir and universal legatee." The defendant pleaded to the jurisdiction of the District Court, on the ground that the Court of Probate, (Parish Court) of the Parish of St. Landry, had exclusive jurisdiction of the action. The District Judge held: "that as *the will* sought to be annulled *had been admitted to probate*, and ordered to be executed, the Court had no jurisdiction, but that the *Probate* Court had exclusive jurisdiction of the case." On appeal this judgment was reversed, on the ground that the *District* Court had jurisdiction. The same doctrine was held in Sharp vs. Knox, 2 Lou. 25; Trahans vs. Ardouins' Heirs, 11 Lou. 390; Robert vs. Alliers' Agent, 17 Lou. 15.

The only exceptional case is that of Blasini vs. Blasini, 30 An. 1388, wherein, after submitting, without exception to the jurisdiction of the lower, the Second District Court, the defendants filed such exception in the Supreme Court, on the ground that the action being one for annulment of a testament, and they as heirs, having been put in possession by order of Court, that Court had no jurisdiction of the action of nullity.

lar to proceedings *in rem*, when both the law regulating them and their record,—annexed *in extenso* as an exhibit,—show that they lacked every essential of a proceeding *in rem*, either of parties, time, notice or issues:

That *said proceedings* embraced an exclusive jurisdiction as to the invalidity of the testament on grounds of substance, when, as *to such issue*, the proceedings embraced no jurisdiction whatever:

That, because this Court, in absence of proper parties, a controversy or an issue, at law or in equity, has no jurisdiction of proceedings of probate, it has not a jurisdiction of the case now presented as to the validity of the testament itself, involving a controversy having even all the essentials of a suit in equity and between proper parties:

That the unsoundness of mind, undue influence and illegality, specially set forth in complainants' bill as grounds, rendering null the testament itself, should be treated as plead simply against the order for its probate;

That the case made by plaintiff's bill, *so far as the question of jurisdiction is concerned*, is in all material respects that made in the case of Broderick:

That under the Broderick case, it is a rule, *without exception*, that a Court of Equity has not jurisdiction to avoid a will or set aside a probate thereof for the grounds of fraud, mistake, forgery or other causes; when the opinion in that case expressly states that such rule is dependent upon the character of State law *determining the jurisdiction of State Courts*, and the same Court subsequently affirmed the intent of that opinion to be, that while "by the general jurisdiction of Courts of Equity, independent of statutes, a bill will not lie to set aside a will or its probate. * * But that such jurisdiction may be vested in the State Courts of Equity by statute is there recognized, *and that when so*

vested, the Federal Courts, sitting in the States where such statutes exist, *will also entertain concurrent jurisdiction in a case between proper parties*:

That the material differences between the cases of Broderick's heirs and Gaines vs. Fuentes, by which jurisdiction was denied in one case and recognized in the other, consisted in the fact that in the case of Gaines vs. Fuentes, the Court in describing the character of the suit, says:

"The action is in form to annul the alleged will of 1813, of Daniel Clark and recall the decree by which it was probated, but as the petitioners are not heirs of Clark, nor legatees, nor next of kin, and do not ask to be substituted in place of the plaintiffs in error, the action cannot be properly treated as for the revocation of the probate, but must be treated as brought against the devisee by strangers to the estate to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity was established as it effects their property;

When the Court, in Gaines vs. Fuentes, clearly state that the reasons for difference of ruling in the two cases were, 1st, the difference of the equity powers of California and Louisiana Courts, and 2d, the increased jurisdiction given by the Circuit Court by the statute of 1867. Wherein, however, in this regard, did the relation of parties in the Broderick case differ? The controversy in that case was between Broderick's legal heirs and *purchasers* under his alleged will. In the Fuentes case the controversy was between Mrs. Gaines, as universal legatee under her father's will of 1813, and *purchasers* under his previous will of 1811. Both of these cases sought the revocation of order of probate on the ground that neither Clark nor Broderick ever executed the alleged instrument. As to character of parties and nature of con-

troversy these two cases were substantially the same. In the case at bar it is admitted that Mrs. Dorsey did write and execute the instrument, and the action is not strictly against the *form* or *evidence* establishing the execution of the testament. Though in both of the former cases the purchasers might in one sense, be considered strangers to the respective succession, that is, they were not heirs or legatees, yet their titles were by them claimed to have been derived from those estates. Had this not been so, it would not have mattered to them who were the heirs of Broderick or which of the wills of Clark was valid. But, in all seriousness, how can a jurisdiction depending on the sole essentials of a controversy, or a suit in equity between citizens of different States, be further dependent upon whether the alleged rights of one of the parties are derived by fraudulent *bequest* or fraudulent *purchase* under a forged or fraudulently proved will? Neither by the Constitution, the Acts of 1789 and 1875, nor their interpretation by the Supreme Court, was it intended, it is respectfully submitted, to subject the jurisdiction of a Federal Court to any such limitation."

The foregoing reasons are, it is believed, substantially the grounds advanced on behalf of the demurrer to the jurisdiction of this Court.

But the foregoing examination of an alleged *exclusive* jurisdiction of the Second District of the succession of Mrs. Dorsey, gives rise to another inquiry. It is, whether, under the law of Louisiana, her succession has been, *at any time* or *in any respect*, within the jurisdiction of the Second District Court?

The law determining this is clear and positive. Articles 985 of Civil Code and 929 of Code of Practice fix the place—the parish—for the opening of succession as follows:

"In the parish where the deceased *resides*, if he had a fixed domicil or residence *in the State*. In the parish where the deceased *owned immovable* property, if he had no domicil or residence in this State, or in the parish in which it appears by the inventory his principal effects are, if he has effects in different parishes.

"In the parish in which the deceased has died, *if he has no fixed residence*, nor any immovable effects, within the State, at the time of his death."

Defendant's petition for the probate contains no allegation showing the jurisdiction of the Second District Court; allegations not only usual, but which when the petition is addressed to a Court of limited or special jurisdiction, are considered essential.

The bill, and exhibits annexed, show that, at her death, Mrs. Dorsey was a resident of *Harrison County, Mississippi*, and the bill shows it to have been so from *the Fall of 1876*, when defendant came to reside at Beauvoir. The act of procuration executed by her to defendant in May, 1878, and the act of sale of February, 1879, thus state her residence; though the alleged will of January 4, 1878, describes her "of Tensas Parish, La."

The bill states her Louisiana property to be *immovable* and situate in *Tensas* Parish. Hence, clearly the

Second District Court for the Parish of Orleans had not, at Mrs. Dorsey's death, any jurisdiction whatever of her succession. And no act of parties could subsequently give it, as settled in 3 Annual, 261.

Moreover, by Art 1644, Civil Code, *no testament can have effect* unless it has been presented to and probated by the Judge of the Parish *in which* the succession is opened.

By Articles 1688, 1689, testaments made in other States of the Union and *there probated* cannot be carried into effect on property in this State without being *first registered*, or, if not so probated, being *first probated* and registered, *in the Court within the jurisdiction of which the property is situated*.

Hence, it is evident, that the proceedings of probate of July 15, 1879, in the Second District Court, by the facts *shown and admitted of record*, were had without authority of law; were, in truth, *coram non judice;* and, therefore, the alleged testament, until properly probated and registered, *remains inoperative and without effect.* And this is so not only by the prohibitory law of Louisiana, but under the general law.

"A deliberate consideration of the question," say the Supreme Court in Gaines vs. Relf, 2 How. 146, "leads "us to say, that both the general and local law re- "quires a will to be proved, *before any title can be set* "*up under it.*"

If recognition be given to this authoritative statement of the law, defendant's pretended muniment of title has not, as made apparent by the record before the Court, the authentication essential to its forming a bar to complainants' action; and the principle will scarcely be controverted, that in such cases, no *formal action* is required to have it so treated.

Another, and anomalous, result would arise by the sustaining of this demurrer to jurisdiction.

The Second District Court, as well as the other Civil District Courts, for the Parish of Orleans, *are abolished* by the present State Constitution, and their respective, exclusive and limited jurisdiction remitted to one Civil District Court. Art. 130, Constitution of 1879.

This Civil District Court will be organized on 1st of August next, (1880).

As it is not controverted that causes within the jurisdiction of such District Court, so vested with unlimited general jurisdiction, would be only concurrent with this Circuit Court, when warranted by the condition of the parties, it follows, that only a short time need elapse ere the jurisdiction in the case at bar will appertain to this Court.

This would be the case either by withholding the decision of this application for re-hearing, by bill of review, or renewal of an action brought in said Second District or the new District Court, or a new bill in this Court.

To say the least, it is a singular condition of the jurisdiction of this Court from which such consequences can flow.

It remains for this Court to determine whether the provisions of the Constitution, the law and the authorities herein set forth, grant jurisdiction to this Court over the controversy presented by these complainants against this defendant. Their recital has been full and extended, and, it is trusted, fair; and this because not only of the importance that a question of jurisdiction should, at the first instance of a cause, be correctly determined; that counsel considers the Court, to which the demurrer seeks to remove a part only of the cause, is without jurisdiction, and, therefore, such removal would end only in a useless delay, and that by the language of the Constitution and the Statute of March 3, 1875, this Court has jurisdiction over the whole controversy, but, also, in as much as these complainants are impressed with the conviction that, from circumstances not of their creating nor under their control, they present a case strongly appealing for this Court's consideration of the motive and object which induced the Constitutional Convention and Congress to entrust to Federal tribunals jurisdiction over controversies between citizens of different States and subjects of foreign States.

Though it be true, that the question of jurisdiction is, in some instances, a difficult one, and its solution

delicate, or it may be unpleasant, yet rigid and imperative must be the duty for its determination when that jurist, so unapproachable in judicial wisdom, and in discharge of judicial duty so inflexible, announced as a rule obligatory on the high Court over which he so illustriously presided:

"It is most true, that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever dificulties a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscienciously perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

In like manner, in doing this *on the present occasion*

we find this tribunal invested with jurisdiction over controversies between citizens of different States, and between citizens of a State and citizens or subjects of a foreign State. We find no exception in *this* grant, and, it is respectfully and earnestly submitted, none can be inserted.

OTHER SPECIAL GROUNDS OF DEMURRER.

Inasmuch as the Court, after sustaining the demurrer to its jurisdiction, considered it unnecessary to examine the other grounds of demurrer, reference is now only drawn, on behalf of complainants, as regards such other grounds, to what was advanced, orally in argument, and by brief.

Demurrer to the averment of testatrix's unsoundnees of mind.

It is submitted that the averment of the bill, that previous to and at the time of "writing and signing the "same, said testatrix was not of sound and disposing "mind," is sufficiently stated.

The law is general, and as stated in Art. C. C., 147, that "to make a donation *inter vivos* or *mortis causa*, "one must be of sound mind." It is a substantive charge, made in the words of the law, and which, it is believed, has always been held sufficient.

True, the evidence must be to the various acts, establishing that the testatrix was not of sound mind,

but to require all such acts to be stated in the pleading, in order to authorize the introduction of proof, would not only be impracticable, but unreasonable. The issue is, simply, soundness or unsoundness of mind, and that issue, clearly stated, is sufficient. It matters not the character of the unsoundness; the causes of it. Who, indeed, can fully state them. It is enough that the actions of the person should furnish convincing proof of the unsoundness.

Among other various causes and acts indicating Mrs. Dorsey's unsoundness of mind, several are fully set forth in the bill. That she had a peculiar mania, even while on some subjects, exhibiting a high order of intelligence, is immaterial, provided it appears, as charged, that such mania, or other acts and conditions, evidenced her to be of unsound mind.

The rule was correctly stated in the case of Montreuil vs. Frere, 9La., 373 :

"The plaintiff alleges that he was free for many "years. In support of that allegation, he was author- "ized to avail himself of any legal evidence in his favor, and parties are not bound in their pleadings to specify the proof on which they intend to rely."

A recognized precedent referring to a jury a question of sanity, is simply :

"Whether H., in etc., named, at the time of the "execution of the indentures dated, etc., in etc., men- "tioned, was of sound mind, understanding, and capa-

"city to execute the said deeds." Daniels' Chancery Plead., Vol. 3, p. 2334.

Demurrer to averment of Undue Influence.

1. The bill not only avers undue influence, but alleges that it was of such nature, that it "excited and "aggravated the causes depriving the testatrix of a "sound and disposing mind;" that is, it tended, not merely to ordinary persuasion, capatation, (which alone it can seriously be contended the laws of Louisiana intends to protect the wrong-doer in), but was directed at those weak elements of her character which actually, in that regard, dethroned her reasoning faculties. And it is worthy of consideration, as corroborative proof, that its influence finds expression in the language of the testament.

2. As the will was executed in another State, whose laws stamp with nullity a will made under such influence, for the laws of Louisiana alone deny protection to the weak against such wiles, it becomes a matter of serious consideration whether Art. 1492 of the Civil Code should be held to protect the donation even of the property situated in Louisiana. Certainly the protection thus possibly furnished, must be confined to property of the testatrix situate within this State, and not to include that situate in Mississippi and Arkansas.

Demurrer that the averment that [illegible] *the motive and object*

inducing and controlling the bequest itself, were, under the laws of the land, null and void, cannot be enquired into, and are insufficient to sustain the relief asked.

No clearer exposition of the effect of illegal motive, consideration and object upon all, otherwise legal, acts and transactions, could well be given than that by Pothier which, though in that instance, were considered in their effect on obligations, yet in principle apply to all transactions and modes by and through the forms of which rights and property are bestowed or acquired.

"Every contract," says this great jurist, "ought to have a just cause (or consideration). In contracts of mutual interest the cause of the engagement by each of the parties, is the thing given or done or engaged to be given or done, or the hazard incurred, by the other. In contracts of beneficence, the liberality which one of the parties intends to exercise towards the other is a sufficient cause for the engagement contracted in his favor." * * * "When the cause for which the engagement is contracted *is repugnant to justice, good faith, or morals, the engagement and the contract containing it are null.*" * * *

"An example is where an officer promises a sum of money to a soldier to fight with a soldier of another regiment. The cause of this engagement is repugnant to morality on both sides; for the officer has no less acted in contravention to law and morals by making such a promise, than the soldier by receiving it. This second case agrees with the former so far as that the engagement is null, having a cause which is repugnant to morality, and consequently no action can result from it; and the soldier, after having fought, cannot demand

from the officer the money which he has promised; but the cases differ, inasmuch as if the officer, in execution of the void engagement, pays the money agreed upon, he is not entitled to recover it back; for, having no less than the soldier offended law and morality, he is unworthy of the assistance of the law for such a purpose."

"The two-fold decision is included in the very terms of the laws themselves. *Ubi dantes et accipientis turpitudo versatur, non posse repeti dicimus. Quotiens autem solius accipientis turpitudo versatur, repeti potest; l., 3* and *4. Ff. de condic. obturp. caus.*

"There is no doubt, according to these principles, that if I promise anything to a person for committing a crime—for instance, beating another with whom I am at variance—I am not, in point of law, obliged to fulfill my promise. There is more difficulty in deciding the question as a matter of conscience. Grotius maintains that the promise is not obligatory so long as the crime is not committed, and that up to that time the party making the promise may retract and give a countermand to the other; but that, as soon as the act is committed, the promise becomes obligatory by the rules of natural law, and in point of conscience. * * *

"Puffendorf, on the contrary, thinks that a promise made to a person for committing a crime is no more obligatory after his committing it than before; because *the recompense of a crime which is involved in the accomplishment of such a promise, is no less* contrary to natural law and good morals than the invitation to the crime. And, if, after the commission of the crime, the accomplishment of the promise is no longer an inducement to the commission of that crime, it is an inducement to the commission of others. Beides, every obligation supposes a right in the person in whose favor it is contracted. When I promise anything to a person for

committing a crime, *the acceptance of the promise is not less criminal on his part,* than the making it is on mine. *Now can a crime ever be allowed to produce the acquisition of a right?* Can it be thought that the law of nature is so favorable to villains as to assure them the reward of their offences? These reasons lead me to adopt the opinion of Puffendorf." Pothier on Obligations, Evans' translation, vol. 1, p. 22.

Mr. Evans, in commenting on the foregoing principles of the civil law, and showing to what extent they assimilate with the English law, says:

"In adverting more particularly to contracts which are void as being illegal in their nature, I shall not at present dwell upon those exceptions which are personal to the immediate parties to the contract, as being founded upon fraud, extortion, or *any undue advantage* taken by one party of the necessities of the other, but (dismissing such with the general remark, that the English Courts of law and equity will, in every case attended with those circumstances, *decide according to the great principles of universal justice,*) shall proceed to some observations respecting contracts, the illegality of which is founded upon reasons of public utility and moral rectitude. *Wherever an engagement is entered into with a view to contravene the general policy of the law no form of expression can remove the substantial defect inherent in the nature of the transaction; the law will investigate the real object of the contracting parties, and if that is repugnant to the principles established for the general benefit of society it will vitiate the most regular instrument which ingenuity can contrive.*"

"This subject was most ably discussed by Lord Ch. J. Wilmot in the case of Collins vs. Blantern, 2 Wils. 347. A bond in the usual form for payment of money was alleged to be given as indemnity for a note entered into by the *obligee for compounding a prosecution*

for perjury. In support of the bond it was contended that no averment should be admitted of its being given upon an illegal consideration *not appearing on the face of it.* In the course of his judgment the Chief Justice used the following expressions: 'The manner of the transaction was to gild over and conceal the truth, and whenever courts of law see attempts made to conceal wicked deeds, *they will brush away the cobweb varnish* and show the transactions in their true light. *This is a contract to tempt a man to transgress the law, to do that which is injurious to the community*—it is void by the common law, and the reason why the common law says such contracts are void is for the public good—you shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountain of justice."

"The whole of the judgment, from which these extracts are made, may be strongly recommended to the perusal of all who are engaged in juridical inquiries."

"Many of the exceptions which fall within the scope of this division *are contrary to the immediate justice which would prevail in a moral view between the contracting parties;* but *the public tribunals will not afford judicial assistance to those whose object is to infringe the general policy of the law,* or to prejudice the rights and interests of others; and perhaps it is one of the greatest securities against transactions of this description, that the contracting parties can have no redress against each other, and that where they are equally guilty of an infraction of the law, the claims of either may be effectually resisted.

"Upon this subject it can hardly be necessary to state, that transactions which have for their object the encouragement of manifest crimes; and any engagement of a reward to abstain from such crimes is equally discountenanced, as it might effectively lead either to

criminality or extortion. * * * *Every transaction the object of which is the violation of a public or private duty, is also void.*"

Pothier on Obligations, vol. 2, p. 1, Evans' Treatise.

This is but the voice of equity. Says Story, treating of agreements considered as frauds upon public or moral law:

"The rule of the Civil law on this subject speaks but the language of universal justice. '*Pacta, quæ contra leges constitutiones que, vel contra bonos mores fiunt nullam vim habere, indubitati juris est.*" It is but applying a preventive check, by withholding every encouragement from wrong, and aiming thereby to enforce the obligation of virtue. * * Hence, all agreements, bonds, and securities, given as a price for *future* and all agreements not under seal to pay for *past* commission of a public crime, or for the violation of a public law, or for the omission of a public duty, *are deemed incapable of confirmation or enforcement* upon the maxim, *Ex turpi contractu non ovitur actio.*" Story's Eq. Juris. vol. 1, § 296.

Is it possible that the voice of universal justice thus speaks of rewards for frauds against public or moral law, when promised through form of commutative agreement, but remains dumb when such reward is bestowed through testamentary bequests?

The authority cited by opposite counsel, from Marcade, is undoubtedly true in the sense, and to the extent, intended by that learned commentator. True, as said, "a testator is free to give to whom he will and

" to the extent he will, and for this no one has the " right to scrutinize his motive, or to hold him to ac " count for the use which he has made of his liberty,' *provided,* he has disposed of it in accordance with the provisions of law. This is true as regards sale and every mode of disposing of one's ownership, whether by testament, sale, exchange or manual gift. But the question ever returns, in considering the validity of such disposition of one's ownership, to another—are the motive and object of the owner in the disposition consonant with, or repugnant to the law of the land? If repugnant, it is admitted by the learned counsel that the owner's attempt, by contract, to transfer to another his ownership, on the obligor's promise to perform, or even the discharge of his obligation, would be null and void. Why should a bequest wherein the owner's motive and reasons for, and the bequest itself, are contrary to the law of the land, be protected?

Nor is it true, that the liberty allowed to the owner in disposing of his property by testament, referred to by Marcade, is a liberty *independent* of law. It is not a license, and when attempted to be exercised in a manner which the law declares to be against public policy, the bequest is null. Thus bequests constituting a substitution, or *fidei commissa*,—certain kind of trust, etc., are, by the Civil Code, Arts. 1470–1491, 1519, 1522, declared null and void. Such bequests, therefore, can

not be juridically enforced because they are contrary to the law of the land.

And hence, it is not true, that an owner can by donation or testament transfer his property in violation of the rules of public policy, any more than he can, in disregard of law, incur a conventional obligation or enter into a contract.

This charge is made as a substantive averment, and, it is submitted, is sufficient for admission of evidence, independent of the subsequent recital, setting forth causes for the bequest clearly illegal.

Thus, in Hood vs. Martin, 11 An. 554, the Court, through Merrick, Chief Justice, held:

"In regard to the first bill of exception,s taken by defendant as to the admission of testimony, we are of opinion that the allegation that the patents referred to by the plaintiff, upon which his suit is founded, are null and void and were issued and obtained in fraud and contrary to the laws of the United States and of the State of Loussiana, authorized the proof of what was done by the officers of the United States and of the State of Louisiana, by the parties in the matter of the issuing of the land warrants, the location of the land, the acts of the respective departments thereon and the issuing of the patents.

[To the objections raised by opposite counsel in argument, intended, it may be as demurrer *ore tenus*; that it is necessary, under Louisiana practice, that complainants should first be recognized as heirs in the Probate Court; reference is made to the cases of

Le Paige vs. N. O. Gas Co., 7 Roberts 183, re-affirmed in Harrington vs. Barfield, 29 An. 1300, showing no such previous recognition is required. And also, that this Court, had it any jurisdiction of the case, would be confiend to property situated in this State. Reference is made to the statute determining the jurisdiction; Kent's Com. Vol. 2, p. 464, and the authorities there quoted.]

Demurrer to the averment that the sale of the "Beauvoir" estate was illegal, because of, among other reasons, defendant's agency at the time of sale, inasmuch as such averment, if true, furnishes no ground for the relief asked.

The bill charges the nullity of the alleged sale of February 19, 1879, on the grounds of undue influence and the existence of the agency.

The character of this agency was, as shown by its exhibit, of an exceptional character. It specially authorized him :

"For and in her name to sue and be sued, to purchase, lease, alienate or encumber real estate situated anywhere; to borrow money, to execute notes or other evidence of indebtedness, effect insurance, and, in short, to do and perform any and all acts in relation to her property, both real and personal, which she could lawfully do in person."

This agency had been in active force some ten months previous to the sale. The sale is charged to have been at

a price less than its value, and the deed shows that no part of the price was either paid or secured by privilege or mortgage on the property, but consisted simply of the defendant's notes of hand, maturing, less than one-fifth on the 1st of January, 1880, and the balance on the 1st of January, 1881, 1882.

Again, it is submitted, Equity recognizes the immorality of a transaction so procured, and enforces against its consummation, her great principle of preventive justice.

Treating of transactions, though in which no actual or meditated fraud may be involved, "are yet by their "tendency to deceive or mislead other persons or to "violate private or public confidence or to impair or "injure the public interest, deemed equally reprehen-"sible with positive fraud," Mr. Justice Story says:

"Some of these cases rather grow out of some special "confidential or fiduciary relation between all the par-"ties, or between some of them, which is watched with "special jealousy and solicitude, because *it affords the* "*power and the means* of taking undue advantage, or "of exercising undue influence over others."

After referring to several classes of cases thus falling within the purview of constructive fraud, this distinguished writer says:

"In the next place the relation of principle and "agent. This is affected by the same considerations as

" the preceding, founded upon the same enlightened
" republic policy. In all cases of this sort the principal
" contracts for the aid and benefit of the skill and judg-
" ment of the agent; and the habitual confidence re-
" posed in the latter, makes all his acts and statements
" possess a commanding influence over the former. In-
" deed, in such cases, the agent too often so entirely mis-
" leads the judgment of his principal that, while he is
" seeking his own peculiar advantage, he seems but con-
" sulting the advantage and interest of his principal;
" placing himself in the odious predicament so strongly
" stigmatized by Cicero: *Totius autem injustitiæ nulla*
" *capitalior est, quam eorum, qui, cum maxime fallunt, id*
" *agunt, ut vivi boni esse videantur.* It is therefore, for
" the common security of all mankind, *that gifts procured*
" *by agents, and purchases made by them, from their*
" *principals*, should be scrutinized with a close and vig-
" ilant suspicion. And, indeed, considering the abuses
" which may attend any dealings of this sort between
" principals and agents, a doubt has been expressed
" whether it would not have been wiser for the law
" *in all cases to have prohibited them* : since there must
" almost always be a conflict between duty and inter-
" est on such occasions. Be this as it may, it is very
" certain that agents are not permitted to become
" secret vendors or purchasers of property which they
" are authorized to buy or sell for their principals; or,

"by abusing their confidence, to acquire unreasonable "gifts or advantages; *or indeed, to deal validly with "their principals in any case,* except where there is "most entire good faith, and a full disclosure of all "facts and circumstances, and an absence of all *undue "influence, advantage or imposition.*"

So applicable are these principles, so clearly expressed and so just, not only to the issue involved in the alleged sale of "Beauvoir," but to all the issues involved in this cause—excepting that of jurisdiction—that their recognition in the judicial enquiry into, and enforcement of the respective rights of these complainants and this defendant, is all that complainants' counsel, on their behalf, respectfully solicits of this Court.

Respectfully submitted,

WM. REED MILLS.

C. C. Leech

109-485

OFFICE SUPREME COURT U.S.
FILED
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JAMES H. McKENNEY, Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

Appeal from the Circuit Court of the United States for the District of Louisiana.

STEPHEN PERCY ELLIS ET AL.
vs.
JEFFERSON DAVIS. } No. 104.

BRIEF FOR APPELLEE.

JNO. D. McPHERSON,
CALDERON CARLISLE,
of Counsel.

WASHINGTON:
1883.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

S. P. ELLIS AND OTHERS,
Appellants,
vs.
JEFFERSON DAVIS.
No. 104.

This is an appeal from the Circuit Court of the United States for the District of Louisiana.

The appellants filed their bill in equity; it was dismissed on demurrer and they appealed.

THE CASE.

Mrs. Sarah Ann Dorsey, a widow aged 50 years, died in New Orleans after a surgical operation, July 4, 1879, leaving no heirs in the ascending or descending line, who are denominated "forced heirs" and protected as such by the laws of Louisiana. Her next of kin were the three complainants, and two others who have not joined in this suit—five in all.

Mrs. Dorsey, by an olographic will, dated January 4, 1878, duly executed, gave and bequeathed all her property to the defendant, and constituted him her sole heir and executor. This will being in a sealed packet, on the petition of C. L. Walker, filed July 10, the second district court for the parish of Orleans, fixed the 15th day of July for the opening of the packet. On that day the packet was opened, and two of the three subscribing witnesses appeared (the third being dead) and proved the execution of the will; whereupon the will was admitted to probate, and

with all formalities ordered to be recorded. Then the legatee petitioned for possession of the property, declaring that the deceased left no forced heirs, and no considerable debts; that there was no necessity for further administration, and that he was willing to accept the succession without benefit of inventory. These allegations being proved by the deposition of three witnesses, it was ordered that the petitioner be recognized as the sole and universal legatee of the deceased, and put in possession of her property. All these proceedings took place on the day appointed by the court—July 15, 1879—and were strictly and entirely regular.

It then became competent for anyone conceiving himself injured by the proceedings to appeal to the Supreme Court, and on such appeal it was competent for the Supreme Court to remand the case to the district court and direct the taking of testimony. The time allowed for taking the appeal was one year for persons in the State; two years for persons out of the State; and for minors one or two years after attaining full age; one of the next of kin was a minor. No appeal so far as appears has been taken. An action of nullity may be brought in the probate court within five or ten years. On the 12th of December, 1879, the complainants filed their bill.

The Bill.

The bill sets forth—

That Mrs. Ellis was during her life seized of or entitled to certain lands, rights, credits, and other property in Mississippi, Louisiana and Arkansas.

That she died intestate July 4, 1879, leaving no heirs of the descending or ascending line, but three brothers, one sister and one deceased brother's only daughter, three of whom are complainants; one a citizen of New York, one a citizen of Missouri, and one sister residing in Louisiana, but by marriage a British subject.

That, in May, 1878, she "constituted said defendant her agent and attorney in fact with full and special powers to take exclusive control, charge and management of all and singular her property and estate and all transactions and business in any manner therewith connected, including the power 'for and in her name to sue and be sued, to purchase, lease, alienate or encumber real estate situate anywhere, to borrow money, execute notes or other evidences of indebtedness,' as will more fully appear" by Exhibit A.

That by virtue of said agency, the defendant entered upon and assumed exclusive management of said property and business—took possession of account books, title deeds and papers thereto appertaining, and continued in such exclusive control, management and possession during the life of his principal.

That the agency expired on the death of Mrs. Dorsey, and it became the duty of the defendant to render to the heirs a full account of his administration of the agency, and to surrender to them the property, account books, title deeds, papers, &c., which had then come into his possession. And the complainants had hoped that he would have done so. Yet, notwithstanding their amicable demand, he refused to do so.

Such is the substance of the stating part of the bill.

The complainants then proceed in the charging part of the bill in the usual form, to set forth the matters which the defendant is supposed to set up by way of defence to the bill; and seek to avoid them.

The 1st is: The will of Mrs. Dorsey, the alleged intestate, as to which they say it was written and signed by her when she was not of sound and disposing mind, and when she was under the undue influence of the defendant, and that the motive and object of the testatrix in making the same "were under the law of the land illegal, null and void."

The 2nd is the proceedings and decrees of the Probate Court, as to which they allege that the defendant procured them to be made, being in nowise ignorant of the premises, without any previous notification, and without some essential prerequisites (not specified) to his demand to be put in possession.

The 3rd is a certain deed, dated February 19, 1879, conveying to defendant, in consideration of his promissory notes for the sum of $5,500, the plantation called "Beauvoir," in the State of Mississippi, as to which they say: 1st. That the deceased was not of sound and disposing mind when she executed it; 2nd. That she was at the time under the undue influence of the defendant; 3d. That her motive and object in making it and the conveyance itself "were under the laws of the land illegal, null and void;" and 4th. That under his agency of May 10, 1878, defendant had no legal right to purchase the property and that his consent to the sale to himself was a violation of the trust assumed by him.

The bill then proceeds to require the answer of the defendant under oath, and to propound certain interrogatories as to which the oath is waived.

The prayers for relief are that it may be decreed:

1st. That the will be cancelled and annulled as absolutely void and of no effect in law; that the decree of probate, the decree recognizing defendant as universal legatee, and the order putting him in possession of the property, be revoked, cancelled and recalled, as absolutely void and of no effect in law, and that the deed of conveyance of Beauvoir plantation be cancelled and annulled, as absolutely void and of no effect in law, "in so far as either said will, decree of probate, decree of possession in any manner to be plead by defendant as recognizing him as testamentary heir and universal legatee of said Sarah Ann Dorsey, or as a muniment of title or legal bar against your

orators or their co-heirs, as her legal and sole heirs entitled to the ownership and possession" of all the property of Mrs. Dorsey.

2d. That it be further decreed that defendant come to an account "of all and singular his acts and doings of his agency," that he furnish to the court a statement of all properties of the deceased which came into his possession or under his control and management as her agent, or of which he has taken possession under the will or decrees of the district court.

3d. That it be further decreed that he surrender unto the complainants, "and if so desired by them, jointly with their co-heirs," all property, books, papers and evidences belonging to the estate.

4th. That the defendant be enjoined "from setting up or pleading the said alleged will and said decree of probate, said decree of possession, and said act of sale," against complainants.

5th. That it be further decreed that he make a full and true discovery "of and concerning all and singular the transactions and matters appertaining to or connected with said agency," and that he account with complainants, and pay over what shall be found due.

Finally, they ask that the two heirs who have not joined "may be made parties complainant in this bill," if in the discretion of the court it should be necessary or advisable in order that the rights of the complainants may not be defeated, offering to secure them against costs and damages.

There is no prayer for general relief. The bill is signed only by counsel, and is not verified by any one.

The scheme of the bill is for an account of the management of certain property, real and personal, lying in three States of the Union, and constituting the whole body of the estate of Mrs. Sarah Ann Dorsey, deceased, and to enjoin the defendant from pleading the will and probate against the heirs-at-law, as recognizing him as testamentary heir, or as a muniment of title to any of said property.

The court below in effect decided that the decree of the probate court could not be attacked in this proceeding in the circuit court of the United States; that the court had no jurisdiction to revoke the probate, and that until revoked it was conclusive of the will and its contents, and deprived complainants of the right to ask any of the relief prayed in the bill. The court said: "The right of the complainants to an account from the defendant depends upon the success of their effort to set aside the will of Mrs. Dorsey and the probate thereof. As long as the decree of the second district court, admitting the will to probate and recognizing the defendant as the sole and universal legatee of Mrs. Dorsey, stands, the complainants have no standing which authorizes them to demand an account of the defendant. * * In a word, if this court has not jurisdiction to set aside the will of Mrs. Dorsey and revoke its probate, it cannot grant the relief prayed for by the bill." This ruling is sustained by an unbroken line of decisions in this court.

Tarver *vs.* Tarver, 9 Pet., 179.
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No case, it is submitted, is made in the bill for the account prayed.

Though the bill seems to aver that the appellee took possession of the lands and other property "in virtue of" the agency created by the power of attorney, yet an inspection of that instrument (Rec., pp. 16, 17) shows that this was not so, because the instrument authorizes no such possession. His possession, if possession he ever had, was, so far as shown, without authority, and wholly tortious. And so of the personal property. The proper remedy, therefore, for recovering possession, is at law.

Nor is a case made for a decree for an account by simply showing that the appellee *had authority* to borrow money, give notes, and transact other business, without averring—and it is not averred—that he ever did a single one of the acts authorized; or received any money for his principal, or ought to have received any; or was in any way indebted to the deceased; or that there were any *money* transactions that ought to be brought into account between them. If the appellee could, under the power, have "assumed the management" of the property and directed the planting, cultivation and harvesting of crops, that would not be the subject of account. But nothing of this could he do, for the generality of the power given is clearly by the specification restricted, according to the rule, to acts *ejusdem generis*.

But in the charging part of the bill the foundation is laid for prayers which seek a totally different species of relief, which is no less than the revocation and annulment of the decrees of the Second District Court of the Parish of Orleans, admitting to probate Mrs. Dorsey's will and ordering the execution of the same.

Points.

I.

The bill on its face shows the complainants have no right to ask any relief against the defendant in respect of the property which they seek to recover, because it shows

that by a will duly admitted to probate, and the decrees of the probate court, the defendant is recognized as the sole and universal legatee of the deceased, and entitled to the possession of all the property left by her: so that complainants are, by their own showing, excluded from the rights they seek to enforce.

The will and probate are evidence of testacy, and these complainants cannot pretend to any rights except there be intestacy.

C. C., §§ 946, 979, 981.

Seltz *vs.* Unna, 6 Wall., 327, 334.

II.

The complainants attempt to avoid the operation of the will and decrees only by alleging that the will was made by the testatrix when she was of unsound mind, and was under the undue of influence of the defendant, and that its motive and object were illegal; that the decree of probate was unadvisedly rendered, and is null and void because the testimony given in support of said probate "is false or erroneous," and insufficient legal proof, and that the decree of possession was rendered without some [not specified] essential prerequisites to the demand of the testamentary heir. This seems to be an attempt to attack the probate collaterally. But the probate of a will cannot be collaterally attacked in a United States court.

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tice adds: "There is no intimation given that a direct action to annul the will and restrain a decree admitting it to probate might not be maintained in a federal as well as a State court, if jurisdiction of the parties was once rightfully obtained." But the case of Gaines *vs.* Fuentes decides no more than that an independent action by strangers against the devisee to annul a will as muniment of title and to restrain the enforcement of a decree of probate, so far as affected their property, might be removed to a United States court, under the act of 1867, and that that act gave the United States court jurisdiction to settle such a controversy. That suit might have been gained by complainants without affecting the validity of the will or probate as to all the world except said complainants, who pretended to special rights and equities as against the defendant. They had no interest in the probate, *qua* probate, except so far as it might affect their property. They were strangers to the estate.

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This is a suit by the heirs-at-law against the instituted heir, who has been put in possession after the will was duly admitted to probate by the decree of the Second District (Probate) Court of the Parish of Orleans, and is governed by other considerations than obtain in suits by or against strangers to the succession. The heir-at-law cannot, as such, collaterally attack a probate. This distinction is taken in the case of Deslondes *vs.* N. O., 14 La. An., p. 554 [A. D. 1859], a portion of the same litigation which came before this court in Fourergne *vs.* N. O., 18 H., 473, and the court say:

"The objection which was fatal to the plaintiff's action in the Supreme Court of the United States has not been avoided by the form in which the present action has been brought."

"The formal probate of a will cannot be disregarded by

parties claiming as heirs-at-law of the testatrix, but never in possession, and they cannot institute a petitory action without seeking to annul such probate."

IV.

If this should be construed as not a collateral but a direct action to annul the will, jurisdiction of such a suit cannot be maintained in a United States court unless the law of the State invests its own courts with such jurisdiction, and the suit so authorized be in its nature a separate suit, and not substantially a continuation of the former proceeding.

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Barrow *vs.* Hunton, 99 U. S., 80, 82.

But this suit in its nature is not then a separate suit: it is substantially a continuation of the proceeding in the probate court.

For the only jurisdiction vested by the law of Louisiana in its own courts to set aside the will and probate was: 1st. By appeal from the decrees of the probate court to the supreme court of the State, if the complainants alleged themselves to be injured. The supreme court had then the power to remand the case for further evidence. Such an appeal is clearly the continuance of the original suit; 2d. By an action of nullity in the probate court; but if such a suit had been brought on the case made in this bill, it would have been "a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it," for it would have been "tantamount to a bill of review or an appeal, of which the United States court could not properly entertain jurisdiction."

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V.

The proceeding, if treated as a direct attack, being in its essence a suit by heirs-at-law for "recognition, and to annul * * a testamentary disposition, is of probate jurisdiction, and it falls within the cognizance of the court in which the will has been admitted to probate and has been executed." 30 La. An., p. 1389. The language of the Supreme Court of Louisiana in a late case (Hoover *vs.* York, 30 La. An., 753), is exactly applicable, *mutatis mutandis*, to the case at bar.

"This suit proper was simply to annul a will and the probate of a will, and to have certain persons plaintiffs declared heirs, and entitled to take as such. This was purely a probate proceeding, and cognizable alone by [the probate court of the parish of Orleans], in which the succession was opened. It was a matter incidental to the opening and settlement of the succession. Constitution, Art 87; C. P. 928, 943; Ibid., 1000, 1003; Ibid., 921, 925. * * * The nullity of the proceedings for the probate of the will, and of orders in execution of it, must be sued for in the court which rendered them. C. P., 608; 15 An., 81."

VI.

This, if treated as a direct action by heirs-at-law to revoke probate of a will, is not a suit "at common law or in equity," within the intent and meaning of the act of March 3, 1875, and as such subject to the concurrent jurisdiction therein conferred on the United States courts.

VII.

But suppose it be contended that this suit, though in form to annul the will and recall the probate, should be treated as brought to annul the will only as a muniment of title and to restrain the enforcement of the decree by

which it was established only so far as it affects the property of the complainants. If such a proceeding might be instituted by strangers to the estate, as in Gaines *vs.* Fuentes, it could not, on the authority of that case, be instituted by the next of kin, for if they succeed as such they must recover the whole estate, and the decree which would be made in that aspect of the case would give the appellants here all the rights of heirs-at-law with none of their obligations, while the appellee would be left burdened with all the obligations of the succession though deprived of its assets.

VIII.

Of the three grounds urged for setting aside the will, that to which most importance is given in the bill is one which, under the laws of Louisiana, does not affect its validity. The Civil Code, Art. 1479, Title II, Chap. 2, "Of the capacity necessary for disposing and receiving by donation *in vivos* and *mortis causa*," enacts as follows: "Proof is not admitted of the dispositions having been made through hatred, anger, suggestion or captation." Captation is defined by Bouvier, as "In French law: the act of one who succeeds in controlling the will of another so as to become master of it." This is the same as undue influence in English law.

The remaining grounds are the unsoundness of the testatrix's mind, and the illegality of the object of the devise which are said to render the devise null and void.

If the object of the devise was illegal, and the devise is absolutely void to all intents and purposes, as contended, then it is void on its face, and the court will make no decree about it.

Story Eq. Jur., 700 *a*.

So that the only ground left to be considered is that

of the unsoundness of the testatrix's mind. And the question is, will the court entertain a suit in equity to set aside a probated will on that ground?

A court of equity has no jurisdiction to set aside a will on that ground, and decree relief against the devisee: for there is nothing left in the case to affect the conscience of the appellee, or to render him amenable to the jurisdiction of this court.

IX.

As to the deed to the Beauvoir estate which they seek to cancel, the appellants do not offer to return the consideration which was given for it, nor do they show such a case as to entitle them both to retain the price and recover the property. He who asks equity must do equity.

As to undue influence that is answered by Art. 1479 of the Civil Code above.

As to the allegation that "under his said agency of May 10, 1878, defendant had no legal right to purchase the property then within his absolute disposal, and that his consent to the sale of said property under these circumstances to himself * * * was a flagrant violation of the trust thus assumed by himself as agent," it is sufficient to say that the property is not shown or alleged, if we take Exhibit A as part of the allegation, to have been within his absolute disposal, and his consent to the sale was of no effect whatever.

If in the exercise of one of the powers given him he had conveyed to a stranger for his own ultimate benefit, without the knowledge or consent of Mrs. Dorsey, the case would be very different. But this very instance illustrates the power retained by Mrs. Dorsey, and was probably another act in furtherance of one of the objects of the letter of attorney, *i. e.*, to raise money, which most probably could not be accomplished by the

attorney in the open market owing to the financial embarrassments of his principal. (Rec., pp. 13, 17.)

CONCLUSION.

We submit the decree below should be affirmed.

J. D. McPHERSON,
CALDERON CARLISLE,
For Appellee.

109-485

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

S. P. ELLIS AND OTHERS,
Appellants,
vs.
JEFFERSON DAVIS.
} No. 104.

This is an appeal from the Circuit Court of the United States for the District of Louisiana.

The appellants filed their bill in equity; it was dismissed on demurrer and they appealed.

THE CASE.

Mrs. Sarah Ann Dorsey, a widow aged 50 years, died in New Orleans after a surgical operation, July 4, 1879, leaving no heirs in the ascending or descending line, who are denominated "forced heirs" and protected as such by the laws of Louisiana. Her next of kin were the three complainants, and two others who have not joined in this suit—five in all.

Mrs. Dorsey, by an olographic will, dated January 4, 1878, duly executed, gave and bequeathed all her property to the defendant, and constituted him her sole heir and executor. This will being in a sealed packet, on the petition of C. L. Walker, filed July 10, the second district court for the parish of Orleans, fixed the 15th day of July for the opening of the packet. On that day the packet was opened, and two of the three subscribing witnesses appeared (the third being dead) and proved the execution of the will; whereupon the will was admitted to probate, and

with all formalities ordered to be recorded. Then the legatee petitioned for possession of the property, declaring that the deceased left no forced heirs, and no considerable debts; that there was no necessity for further administration, and that he was willing to accept the succession without benefit of inventory. These allegations being proved by the deposition of three witnesses, it was ordered that the petitioner be recognized as the sole and universal legatee of the deceased, and put in possession of her property. All these proceedings took place on the day appointed by the court—July 15, 1879—and were strictly and entirely regular.

It then became competent for anyone conceiving himself injured by the proceedings to appeal to the Supreme Court, and on such appeal it was competent for the Supreme Court to remand the case to the district court and direct the taking of testimony. The time allowed for taking the appeal was one year for persons in the State; two years for persons out of the State; and for minors one or two years after attaining full age; one of the next of kin was a minor. No appeal so far as appears has been taken. An action of nullity may be brought in the probate court within five or ten years. On the 12th of December, 1879, the complainants filed their bill.

The Bill.

The bill sets forth—

That Mrs. Ellis was during her life seized of or entitled to certain lands, rights, credits, and other property in Mississippi, Louisiana and Arkansas.

That she died intestate July 4, 1879, leaving no heirs of the descending or ascending line, but three brothers, one sister and one deceased brother's only daughter, three of whom are complainants; one a citizen of New York, one a citizen of Missouri, and one sister residing in Louisiana, but by marriage a British subject.

That, in May, 1878, she "constituted said defendant her agent and attorney in fact with full and special powers to take exclusive control, charge and management of all and singular her property and estate and all transactions and business in any manner therewith connected, including the power 'for and in her name to sue and be sued, to purchase, lease, alienate or encumber real estate situate anywhere, to borrow money, execute notes or other evidences of indebtedness,' as will more fully appear" by Exhibit A.

That by virtue of said agency, the defendant entered upon and assumed exclusive management of said property and business—took possession of account books, title deeds and papers thereto appertaining, and continued in such exclusive control, management and possession during the life of his principal.

That the agency expired on the death of Mrs. Dorsey, and it became the duty of the defendant to render to the heirs a full account of his administration of the agency, and to surrender to them the property, account books, title deeds, papers, &c., which had then come into his possession. And the complainants had hoped that he would have done so. Yet, notwithstanding their amicable demand, he refused to do so.

Such is the substance of the stating part of the bill.

The complainants then proceed in the charging part of the bill in the usual form, to set forth the matters which the defendant is supposed to set up by way of defence to the bill; and seek to avoid them.

The 1st is: The will of Mrs. Dorsey, the alleged intestate, as to which they say it was written and signed by her when she was not of sound and disposing mind, and when she was under the undue influence of the defendant, and that the motive and object of the testatrix in making the same "were under the law of the land illegal, null and void."

The 2nd is the proceedings and decrees of the Probate Court, as to which they allege that the defendant procured them to be made, being in nowise ignorant of the premises, without any previous notification, and without some essential prerequisites (not specified) to his demand to be put in possession.

The 3rd is a certain deed, dated February 19, 1879, conveying to defendant, in consideration of his promissory notes for the sum of $5,500, the plantation called "Beauvoir," in the State of Mississippi, as to which they say: 1st. That the deceased was not of sound and disposing mind when she executed it; 2nd. That she was at the time under the undue influence of the defendant; 3d. That her motive and object in making it and the conveyance itself "were under the laws of the land illegal, null and void;" and 4th. That under his agency of May 10, 1878, defendant had no legal right to purchase the property and that his consent to the sale to himself was a violation of the trust assumed by him.

The bill then proceeds to require the answer of the defendant under oath, and to propound certain interrogatories as to which the oath is waived.

The prayers for relief are that it may be decreed:

1st. That the will be cancelled and annulled as absolutely void and of no effect in law; that the decree of probate, the decree recognizing defendant as universal legatee, and the order putting him in possession of the property, be revoked, cancelled and recalled, as absolutely void and of no effect in law, and that the deed of conveyance of Beauvoir plantation be cancelled and annulled, as absolutely void and of no effect in law, "in so far as either said will, decree of probate, decree of possession in any manner to be plead by defendant as recognizing him as testamentary heir and universal legatee of said Sarah Ann Dorsey, or as a muniment of title or legal bar against your

orators or their co-heirs, as her legal and sole heirs entitled to the ownership and possession" of all the property of Mrs. Dorsey.

2d. That it be further decreed that defendant come to an account "of all and singular his acts and doings of his agency," that he furnish to the court a statement of all properties of the deceased which came into his possession or under his control and management as her agent, or of which he has taken possession under the will or decrees of the district court.

3d. That it be further decreed that he surrender unto the complainants, "and if so desired by them, jointly with their co-heirs," all property, books, papers and evidences belonging to the estate.

4th. That the defendant be enjoined "from setting up or pleading the said alleged will and said decree of probate, said decree of possession, and said act of sale," against complainants.

5th. That it be further decreed that he make a full and true discovery "of and concerning all and singular the transactions and matters appertaining to or connected with said agency," and that he account with complainants, and pay over what shall be found due.

Finally, they ask that the two heirs who have not joined "may be made parties complainant in this bill," if in the discretion of the court it should be necessary or advisable in order that the rights of the complainants may not be defeated, offering to secure them against costs and damages.

There is no prayer for general relief. The bill is signed only by counsel, and is not verified by any one.

The scheme of the bill is for an account of the management of certain property, real and personal, lying in three States of the Union, and constituting the whole body of the estate of Mrs. Sarah Ann Dorsey, deceased, and to enjoin the defendant from pleading the will and probate against the heirs-at-law, as recognizing him as testamentary heir, or as a muniment of title to any of said property.

The court below in effect decided that the decree of the probate court could not be attacked in this proceeding in the circuit court of the United States; that the court had no jurisdiction to revoke the probate, and that until revoked it was conclusive of the will and its contents, and deprived complainants of the right to ask any of the relief prayed in the bill. The court said: "The right of the complainants to an account from the defendant depends upon the success of their effort to set aside the will of Mrs. Dorsey and the probate thereof. As long as the decree of the second district court, admitting the will to probate and recognizing the defendant as the sole and universal legatee of Mrs. Dorsey, stands, the complainants have no standing which authorizes them to demand an account of the defendant. * * In a word, if this court has not jurisdiction to set aside the will of Mrs. Dorsey and revoke its probate, it cannot grant the relief prayed for by the bill." This ruling is sustained by an unbroken line of decisions in this court.

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Of the three grounds urged for setting aside the will, that to which most importance is given in the bill is one which, under the laws of Louisiana, does not affect its validity. The Civil Code, Art. 1479, Title II, Chap. 2, "Of the capacity necessary for disposing and receiving by donation *in vivos* and *mortis causa*," enacts as follows: "Proof is not admitted of the dispositions having been made through hatred, anger, suggestion or captation." Captation is defined by Bouvier, as "In French law: the act of one who succeeds in controlling the will of another so as to become master of it." This is the same as undue influence in English law.

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So that the only ground left to be considered is that

of the unsoundness of the testatrix's mind. And the question is, will the court entertain a suit in equity to set aside a probated will on that ground?

A court of equity has no jurisdiction to set aside a will on that ground, and decree relief against the devisee: for there is nothing left in the case to affect the conscience of the appellee, or to render him amenable to the jurisdiction of this court.

IX.

As to the deed to the Beauvoir estate which they seek to cancel, the appellants do not offer to return the consideration which was given for it, nor do they show such a case as to entitle them both to retain the price and recover the property. He who asks equity must do equity.

As to undue influence that is answered by Art. 1479 of the Civil Code above.

As to the allegation that "under his said agency of May 10, 1878, defendant had no legal right to purchase the property then within his absolute disposal, and that his consent to the sale of said property under these circumstances to himself * * * was a flagrant violation of the trust thus assumed by himself as agent," it is sufficient to say that the property is not shown or alleged, if we take Exhibit A as part of the allegation, to have been within his absolute disposal, and his consent to the sale was of no effect whatever.

If in the exercise of one of the powers given him he had conveyed to a stranger for his own ultimate benefit, without the knowledge or consent of Mrs. Dorsey, the case would be very different. But this very instance illustrates the power retained by Mrs. Dorsey, and was probably another act in furtherance of one of the objects of the letter of attorney, *i. e.*, to raise money, which most probably could not be accomplished by the

attorney in the open market owing to the financial embarrassments of his principal. (Rec., pp. 13, 17.)

CONCLUSION.

We submit the decree below should be affirmed.

J. D. McPHERSON,
CALDERON CARLISLE,
For Appellee.

109-485

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

S. P. ELLIS AND OTHERS, *Appellants*, *vs.* JEFFERSON DAVIS. } No. 104.

AUTHORITIES CITED FOR APPELLEE.

Tarver *vs.* Tarver, 9 Peters, 179 :

Bill by heirs-at-law against devisee in District Court of the United States for Southern District of Alabama, exhibiting will which they allege to be conditional, and the probate of which they allege to be void, alleging that the devisee had taken possession of all lands and effects, and praying an account of the real and personal estate, and "that the will may be cancelled and the property of the deceased be distributed according to the laws of Alabama."

The court held that a "bill cannot be sustained on the allegation that the probate is void. * * If any error was committed in admitting this will to probate, it should have been corrected by appeal. This is provided for by the laws of Alabama," &c.

Gaines *vs.* Chew et al., 2 How., 645.

This was a bill filed against the executors and purchasers under the will of 1811, charging fraud in the probate of

that will, and presenting the rights of the claimants in two aspects:

1. Under the will of 1813, which had never been admitted to probate; and—

2. As forced heir, entitled to four-fifths of the succession by the law of Louisiana.

Considering the first aspect, the court held, after deliberate consideration, "that both the general and local law require the will of 1813 to be proved before any title can be set up under it," but they sustained so much of the bill as prayed discovery.

Considering the second aspect, the court held that, in view of the forced heirship of Mrs. Gaines, and the fraud charged, the court might be enabled to give proper relief without decreeing the revocation of the will, and that the nature of the case did not admit of a plain and adequate remedy at law, though "there was no doubt as between the heir-at-law and devisee in ordinary cases, the proper remedy is to be found in a court of law."

Fouvergne *vs.* The City of New Orleans, 18 How., 473.

This was a bill filed to recover a share of a succession by heir-at-law against the city holding under the will which had been proved before the Spanish alcalde in 1792—the bill alleged fraud in the procurement of the will and of the probate. The court refused to disregard the probate, and said, "this decree remains in full force never having been attacked but in this collateral way. The courts of the United States have no probate jurisdiction and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed as conclusive of

the validity and contents of a will. * * If any error was committed in allowing the probate, the remedy is in the State courts according to their appropriate modes of proceeding."

Heirs of Deslondes *vs.* The City of New Orleans, 14 La., 554 :

This was a portion of the same litigation as the preceding case.

Both parties claimed through Marie Deslondes ; plaintiffs as heirs-at-law, defendants under the will. The court cited the opinion of the Supreme Court of the United States in Fouvergne case and said ; "The formal probate of a will cannot be disregarded by parties claiming as heirs-at-law of the testatrix, but never in possession ; and they cannot institute a petitory action without seeking to annul probate."

Gaines *vs.* New Orleans, 703 :

This was a bill charging fraud, seeking discovery from the defendants and praying a delivery of property and an account of rents and profits, and for general relief.

All the rights of the complainant were asserted under a will, and the defence sought to attack it.

"The attempt," say the court, "to impeach the validity of this will, shows the importance attached to it by the defence * * but the will cannot be attacked here. When a will is duly probated by a State court of competent jurisdiction, that probate is conclusive of the validity and contents of the will in this court."

Broderick's Will, 21 Wallace, 503–517.

This was a bill by heirs-at-law against parties holding under the will, charging fraud and perjury, and praying that the will might be declared a forgery, that the probate might be annulled and that defendants might be charged as trustees and compelled to convey to them. The bill was dismissed on demurrer by the circuit court, and the decree affirmed here.

"It needs no argument to show" said Mr. Justice Bradley in the course of his opinion, "as it is perfectly apparent that every objection to the will or probate could have been raised, if it was not raised in the probate court during the proceedings instituted for proving the will, or at any time within a year after probate was granted * * and that the relief sought would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depends the entire right of the parties; and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case a court of equity will not interfere for it has no jurisdiction to do so. The probate court was fully competent to afford adequate relief." P. 517.

The case of Allen *vs.* McPherson, 1 House of Lords Cases, N. S., 191, is cited by Mr. Justice Bradley in Broderick's Will case.

The bill made a strong case of fraud—jurisdiction of equity denied because probate court could have afforded all relief by refusing probate, and if an error was committed that should have been set right on appeal.

The distinction is clearly drawn between fraud in obtaining a will which infects the whole, and is a probate matter, and fraud on the next of kin on obtaining the pro-

bate which has been set right in equity. The bill was finally dismissed by the House of Lords.

Lord Lyndhurst, p. 211: "If the fraud was cognizable by the ecclesiastical courts and would, if established, have been ground for refusing the probate, to adopt the course suggested (declare defendants trustees) would be in effect * to make the court of chancery a court of appeal from the ecclesiastical court, a course more objectionable [he does not say only objectionable] in the present instance, the case having been decided after full hearing."

Lord Brougham, p. 225: "The bill says": 'Make C. D. trustee for me,' but in substance and effect, it amounts to one thing, viz., 'Revoke the 9th codicil * * * I complain of the 9th codicil as having been obtained by fraud; declare that notwithstanding the 9th codicil which revokes the first eight, I am entitled to the benefit under the first eight.'" And he concurred with Lord Lyndhurst that the bill should be dismissed.

Lord Campbell, p. 232: "Question seems to be whether an appeal from the court of probate shall be to the court of chancery or to the judicial committee of the privy council." * * *

"According to the allegations of the bill, the probate * ought not to have been granted."

"Nay, my Lords, by this process," says Lord Campbell, speaking of declaring a trust in such a case, "You might review the sentence of the ecclesiastical court in refusing probate." And he concludes that next of kin might thus be declared trustees for the legatees.

"Probate ought to have been refused, and the refusal of probate would have done complete and final justice between the parties;" and for this reason he concurred with Lords Lyndhurst and Brougham, in allowing the demurrer and dismissing the bill.

In Gaines *vs.* Fuentes, 92 U. S., strangers to the estate alleged that the instituted heir had obtained a decree of probate by fraud and perjury, and had actually begun suits against them in the circuit court of the United States, where they could not attack the probate collaterally, and though the action was in form to annul the will, and recall the probate, the court said: "As the petitioners are not heirs of Clarke, nor legatees, nor next of kin, and do not ask to be substituted in place of the plaintiff in error, the action cannot be treated as properly instituted for the revocation of the probate," &c.

In Gaines *vs.* Fuentes, Mr. Justice Bradley, not only dissented from the conclusion of the majority, but particularly from the very starting point of their reasoning, viz.: that the suit could not "be treated as a proceeding instituted for the revocation of the probate," and he expressed his conviction that, "the proceeding in the case below *was* one to revoke the probate of a will; simply that and nothing more." All his reasoning was based on this view of the essential character of the proceeding. "It certainly cannot be seriously contended" he says on page 25, "that if the federal courts have no jurisdiction of the probate of wills, they, nevertheless, have jurisdiction of proceedings to revoke the probate. This would be to assume the whole jurisdiction of the subject.

Seltz *vs.* Unna, 6 Wallace, 327, 334:

Bill filed by Seltz, and another, to enjoin the marshal from making deed to real estate sold under execution. Bill dismissed, it appearing from the bill itself that complainants had parted with the property.

The Constitution of Louisiana of 1868, Article 83, gave to the second district court of the parish of Orleans "exclusive probate jurisdiction."

Code of Practice, § 924:

"Courts of probate have exclusive power to open and receive the proof of last wills and testaments, *and to order the execution* of the same."

608. The nullity of judgment may be demanded from the same court which has rendered the same, or from the court of appeal before which the appeal from such judgment was taken pursuant to the provisions hereafter expressed.

609. The nullity can be demanded on appeal only while the appeal is still pending, and when the nullity is apparent on the face of the records."

In David, adm'r, *vs.* Calouret (1 La. Ann., 171), the Supreme Court of Louisiana say:

"The settlement made before the notary under the order of the judge * * * sought to be annulled in this suit, was made the judgment of the court by a decree * * * * and before that court alone ought the action to annul the act to have been brought."

The Civil Code of Louisana provides in substance:

946. That the rights of the heir are in suspense until he decides whether he accepts or renounces.

979. That the heir *ab intestato* cannot renounce until the instituted heir has decided to accept or renounce.

981. That if heir *ab intestato* accepts, under the impression that there is no will, his acceptance is null if a will be discovered.

1602. That where there are no forced heirs, the instituted heir is seized of the effects of the succession.

The case of Lewis' Heirs *vs.* Executors, 5 La., p. 387, was an action in the probate court to "annul and set aside an instrument which had been probated as his last will and testament; or in case the will should not be declared void in toto to have certain bequests therein contained annulled." The court held, p. 392, that the probate court had jurisdiction.

"While that judgment or order stood unreversed," say the court, speaking of the probate, "no other court could declare the will void, and say it should not be executed. The suit was therefore properly brought, no other tribunal could collaterally examine into the correctness of the proceedings by which the will was probated." P. 394. In this case the probate court declared the will null and void.

Blasini *vs.* Blasini, 30 An., p. 1389, appeal from probate court. The forced heirs, children of a first wife, brought suit against the widow (2nd wife) and her son who had been put in possession. The court held that "a suit by forced heirs for recognition, and to annul in whole or in part a testamentary disposition, is of probate jurisdiction, and it falls within the cognizance of the court in which the will has been admitted to probate, and has been ordered to be executed."

Hoover *vs.* York, 30 Ann., 753, appeal from probate court suit by heirs-at-law against executors and instituted heirs. "This suit proper," say the court, "was simply to annul a will and the probate of a will, and to have certain persons, plaintiffs, declared heirs, and entitled to take as

such. This was purely a probate proceeding and cognizable alone by the parish court in which the succession was opened; it was a matter incidental to the opening and settlement of the succession." * * * "The nullity of proceedings for the probate of wills must be sued for in the court which rendered them."

Dooley *vs.* Gibson, 32 An., p. 959, appeal from district court suit by heirs-at-law against instituted heirs. In this case it was objected that "the succession of Gibson had long been closed and the property thereof delivered to the heirs legal and instituted, and therefore the parish (probate) court had not jurisdiction to hear and determine the case."

The exception was overruled below, and the decision affirmed by the Supreme Court. The petition prayed "that the said will of C. D. Gibson be set aside and annulled, and probate of the same be annulled and set aside and vacated, and be declared of no effect as to petitioners, or to any portion of the immovable property of the succession."

The Supreme Court of Louisiana said: "The prayer of the petition determines the character of the action and clearly brings it within the jurisdiction of the parish (probate) court." P. 960. And expressly held that the fact that the heirs had been put in possession, did not take away the jurisdiction of the probate court.

The cases cited in brief for appellant, 30 An., 139, *ibid*, 1338, and 31 An., 506, are all cases of partition between heirs who had accepted possession from probate court without partition, and were held therefore to be like any other persons desiring partition, and not to present any matter within the jurisdiction of the probate court.